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EQUAL EMPLOYMENT AND THIRD PARTY PRIVACY INTERESTS: AN ANALYTICAL FRAMEWORK FOR RECONCILING COMPETING RIGHTS

DEBORAH A. CALLOWAY*

INTRODUCTION

TITLE VII of the Civil Rights Act of 1964¹ prohibits sex discrimination in employment. The statutory prohibition is deceptively simple. It prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."² Reconciling these words with other important interests, such as privacy, has proved troublesome. Courts have interpreted Title VII broadly to prohibit both intentional sex discrimination and neutral employment practices that have a disparate impact on employees of one sex.³ Both forms of discrimination are subject to narrow exceptions. The statute permits intentional discrimination "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."⁴ In addition, the judicially developed business necessity defense provides an exception to disparate impact discrimination when a challenged neutral employment practice is necessary for an employer to operate a business safely and efficiently.⁵ Recently hospitals, prisons and other employers have relied on the bona fide occupational qualification (bfoq) defense, asserting that it permits them to discriminate on the basis of sex to protect the privacy interests of their customers, patients, prisoners or employees.

Does Title VII require employers to hire without regard to gender despite the privacy interests of third parties? Are prisons required to hire female guards to search and supervise male inmates while they sleep,

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, §§ 701-716, 78 Stat. 241, 253-66 (1964) (codified as amended at 42 U.S.C. § 2000e (1982)) [hereinafter cited as "Title VII"].

2. 42 U.S.C. § 2000e-2(a)(1) (1982).

3. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

4. 42 U.S.C. § 2000e-2(e) (1982).

5. See *infra* notes 185-92 and accompanying text.

shower, change clothes and use the toilet? Are hospitals required to hire male nurses to examine, clean and care for pregnant women in labor and delivery rooms? The first courts to consider these questions were quick to answer in the negative.

Laws forbidding discrimination in hiring on the basis of sex do not purport to erase all differences between the sexes. These laws recognize that there are jobs for which one sex is inherently and biologically more qualified than those of the opposite sex. The biological difference between men and women which in turn produce [sic] psychological differences are the facts that justify limiting personal contact under intimate circumstances to those of the same sex.⁶

[I]t would be a considerable violation of community standards of morality or propriety to have a person of one sex using a toilet or locker room while a person of the other sex was present.⁷

Virtually every court facing this issue has agreed that privacy considerations can form the basis of a bfoq defense.⁸ Recently, however, in

6. *Philadelphia v. Human Relations Comm'n*, 7 Pa. Commw. 500, 510 n.7, 300 A.2d 97, 103 n.7 (1973). Although this case was decided under the Pennsylvania Human Relations Act, the court held that "the language used by the Pennsylvania Legislature in providing the 'bona fide occupational qualification' exception demonstrated that it intended this term to be synonymous with, and interpreted in like manner as that same term is used in the Equal Employment Opportunity Act." *Id.* at 506, 300 A.2d at 101.

7. *Corn Prods. Co. Int'l v. Oil, Chem. & Atomic Workers Int'l Union*, 1970 Lab. Arb. Awards (CCH) ¶ 8432, at 4414 (1970) (Gross, Arb.). In this case, the arbitrator applied Title VII's bona fide occupational qualification (bfoq) defense to find that the employer's refusal to assign a female to clean a men's bathroom was permissible. *See id.* at 4413-14.

8. *See, e.g., Hardin v. Stynchcomb*, 691 F.2d 1364, 1370-71 (11th Cir. 1982) (to establish a valid bfoq defense, employer must prove that he cannot reassign essential job responsibilities to eliminate the clash between privacy interests of inmates and employment rights of female deputy sheriffs); *Brooks v. ACF Indus.*, 537 F. Supp. 1122, 1131-32 (S.D. W. Va. 1982) (privacy rights of third parties may be basis for valid bfoq); *EEOC v. Mercy Health Center*, 29 Fair Empl. Prac. Cas. (BNA) 159, 162-63 (W.D. Okla. 1982) (same); *Harden v. Dayton Human Rehab. Center*, 520 F. Supp. 769, 777-81 (S.D. Ohio 1981) (privacy can be basis for bfoq if employer can show factual basis for privacy infringement and inability to rearrange job responsibilities); *Backus v. Baptist Medical Center*, 510 F. Supp. 1191, 1193-96 (E.D. Ark. 1981) (privacy rights of third parties may be basis for valid bfoq), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982); *Fesel v. Masonic Home, Inc.*, 447 F. Supp. 1346, 1350-51 (D. Del. 1978) (privacy interests of third parties may be basis for valid bfoq defense), *aff'd mem.*, 591 F.2d 1334 (3d Cir. 1979); *Sutton v. National Distillers Prods. Co.*, 445 F. Supp. 1319, 1325 (S.D. Ohio 1978) (same), *aff'd*, 628 F.2d 936 (6th Cir. 1980); *Reynolds v. Wise*, 375 F. Supp. 145, 151 (N.D. Tex. 1974) (same); *Long v. California State Personnel Bd.*, 41 Cal. App. 3d 1000, 1015-18, 116 Cal. Rptr. 562, 572-75 (1974) (same); EEOC Decision No. 82-4, 28 Fair Empl. Prac. Cas. (BNA) 1845, 1847 (1982) (to establish valid bfoq defense, employer must prove that he cannot rearrange essential job responsibilities to minimize clash between privacy interests of detainees and non-discrimination principle of Title VII); *cf. Philadelphia v. Human Relations Comm'n*, 7 Pa. Commw. 500, 510-12, 300 A.2d 97, 102-03 (1973) (interpreting Pennsylvania Human Relations Act). *But see Griffin v. Michigan Dep't of Corrections*, 30 Fair Empl. Prac. Cas. (BNA) 638, 646-48 (E.D. Mich. 1982) (sex is not a bfoq for positions requiring guards to view naked inmates of the opposite sex); *Forts v. Ward*, 471 F. Supp. 1095, 1099 (S.D.N.Y. 1978) (court acknowledging that sex is not a bfoq for "the

response to a flood of litigation both by prisoners seeking privacy and by individuals of both sexes seeking employment as prison guards, courts have adopted a solomonic approach to the problem designed both to promote equal employment and to protect inmate privacy. Under this approach, courts have refused to find that sex is a bfoq for the position of prison guard if the prison can modify its procedures or structures to eliminate the privacy infringement altogether.⁹

Although this approach appeals to courts, employees and prisoners,¹⁰ the legal theory on which it is based mandates results that conflict with the underlying principles of Title VII. Under current treatment of the issue, courts permit employers to discriminate on the basis of sex whenever equal employment would result in unavoidable privacy infringements. Nudity can be shielded from sight, but when an employee must touch another individual to perform his or her job, the invasion of privacy cannot be eliminated. Salespersons must fit pants, police must frisk suspects, nurses and doctors must examine patients and guards must search prisoners. Relying on community standards of privacy, courts have permitted hospitals to exclude males from positions requiring intimate contact with female patients while allowing females to perform nursing tasks involving intimate contact with male patients.¹¹ These decisions contradict Title VII's basic mandate—equal treatment of similarly situated individuals.

The current approach further conflicts with another of Title VII's basic goals because it expressly maintains the status quo. Intimate contact between an employee and a patient of the opposite sex is acceptable when the public is accustomed to it—when females fill their traditional role as nurses and males fill their traditional role as doctors, police officers and

job of a correction officer," yet applying a balancing test nonetheless), *vacated in part on other grounds*, 621 F.2d 1210 (2d Cir. 1980).

9. See, e.g., *Harden v. Dayton Human Rehab. Center*, 520 F. Supp. 769, 779-81 (S.D. Ohio 1981) (noting possibility that conflict could be avoided by permitting female inmates to cover their windows); *Forts v. Ward*, 471 F. Supp. 1095, 1101 (S.D.N.Y. 1978) (requiring "mottled or smoky" glass on shower doors), *vacated in part on other grounds*, 621 F.2d 1210 (2d Cir. 1980); cf. *Bowling v. Enomoto*, 514 F. Supp. 201, 204 (N.D. Cal. 1981) (leaving to California correctional authorities task of fashioning remedy that would maximize equal employment opportunities and minimize intrusions on prisoner privacy).

10. One party to these disputes may not be entirely pleased with the result—the employers who must pay for the costs of the structural and procedural alterations ordered by the courts. The Second Circuit was able to avoid the issue: "We need not decide in this case to what extent an employer may be required to expend money or alter procedures to avoid a situation that, if uncorrected, would justify gender-based discrimination. In this case, the employer has already acknowledged its willingness to make necessary changes." *Forts v. Ward*, 621 F.2d 1210, 1216 (2d Cir. 1980). Other courts have assumed that they have the necessary authority to order employers to pay for necessary modifications. See, e.g., *Harden v. Dayton Human Rehab. Center*, 520 F. Supp. 769, 780 (S.D. Ohio 1981). The extent to which Title VII permits courts to impose costs on defendants in order to promote equal employment is outside the scope of this Article.

11. See *infra* notes 129-49 and accompanying text.

prison guards. Privacy interests are asserted and prevail when men or women attempt to break into the traditionally segregated professions.

The primary purpose of this Article is to resolve the conflict between privacy and equal employment that arises when courts find protectable privacy interests. A secondary purpose is to encourage courts to take a closer look at the assumption that touching or viewing unclothed people of the opposite sex infringes on privacy interests entitled to protection. Part I examines the employment rights and privacy interests that conflict when individuals seek employment in positions requiring such touching or viewing. Part II explores the legal theory currently employed by courts attempting to resolve this conflict. After exposing the flaws in this theory, Part III concludes by presenting a framework for reconciling competing privacy and equal employment rights.

I. POLICY CONSIDERATIONS: THE COMPETING RIGHTS

A. *Employment Rights Implicated*

Employees in many occupations must either touch or view people who are unclothed or who are performing bodily functions. If employers can freely discriminate on the basis of sex to protect the privacy interests of these people, many employment opportunities for women and men will be affected. Corrections, law enforcement and health care are three professions in which equal employment collides with privacy rights.¹²

1. Corrections

The federal prison system employs 3979 correctional officers. Three hundred fifty-five (8.9%) of them are women.¹³ Over 70,000 people work as correctional officers in state prisons.¹⁴ Approximately twelve percent of these are women.¹⁵ Many of these positions are affected by privacy considerations.

The Federal Bureau of Prisons is committed to integrating both sexes into its prison staff by placing both women and men in all positions within the prison system.¹⁶ The only sex-based restriction is that guards may not strip search inmates of the opposite sex, except in an emergency. Some states have adopted the federal policy of fully integrating female correctional officers.¹⁷ Others employ female officers in male prisons, but

12. Occupations such as locker room or bathroom attendant, masseur or masseuse and clothing salesperson also may require employees to view or touch people.

13. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics—1984, at 113 (1985) [hereinafter cited as 1984 Sourcebook].

14. *See id.*

15. *See id.*

16. Telephone interview with Pat Sledge, Special Assistant to Director, Federal Bureau of Prisons (July 20, 1983).

17. California, New York, Wisconsin, Oklahoma and Nevada are among these. *See* Woestendiek, *Uneasy presence*, Philadelphia Inquirer, Feb. 13, 1983, at 6B, col. 3.

prohibit them from working in male cell blocks.¹⁸

In both systems, privacy considerations reduce female employment opportunities because approximately ninety-five percent of the prisoners are male.¹⁹ Even though women comprise twelve percent of the correctional officers in state prisons, they will never be promoted if they are barred from male cell blocks and experience in cell blocks is a prerequisite to supervisory positions. For example, although 198 female guards work in Maryland's male prisons, they are excluded from 671 of the 1065 prison assignments because they cannot enter male cell blocks.²⁰ In Minnesota, women are even barred from the school wing because they cannot work in areas with toilets.²¹

In the federal system and in states that have adopted the federal policy, privacy considerations still affect employment because supervisors continue to be reluctant to assign women to contact positions.²² As these women are transferred to positions that require more intimate contact, inmates may limit female employment by obtaining court orders in invasion of privacy actions.

2. Law Enforcement

Privacy is relevant to employment opportunities in law enforcement because police officers must frisk and search suspects and arrestees of the opposite sex. In 1981, there were 398,064 sworn police officers in the United States, 94.5% of whom were men.²³ Because most suspects and arrestees are male,²⁴ concern for their privacy will result primarily in loss of job opportunities for women.

3. Health Care

Considerations of privacy and of patient preference affect millions of

18. Maryland, Minnesota and Illinois are among these. See Struck, *Female guards find some doors barred*, Baltimore Sun, Oct. 3, 1982, at C4, col. 3; Kimball, *Prison guard fighting alleged sex discrimination*, Minneapolis Tribune, April 4, 1982, at 1B, cols. 3-4; Kleiman, *Women help bring down prison walls*, Chicago Tribune, Feb. 5, 1978, at 5-4, col. 1; cf. Philadelphia Inquirer, Apr. 19, 1983, at 2-B, cols. 1-2 (male inmates in Pennsylvania have sued to enjoin female officers from working in male cellblocks).

19. See Center for Women Policy Studies, *Women Employed in Corrections* xxv (1980).

20. See Struck, *supra* note 18, at C1, col. 5, C4, col. 3.

21. See Kimball, *supra* note 18, at 1B, cols. 5-6.

22. See G. Ingram, *The Role of Women in Male Federal Correctional Institutions*, Proceedings of the One Hundred and Tenth Annual Congress of Correction of the American Correctional Association 275, 277-78, 281 (1980) (male staff employees express reservations about employing females in all-male institutions).

23. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics—1983, at 49 (1984) [hereinafter cited as 1983 Sourcebook]. Nearly all of the jobs are affected since all officers are required to do some patrol work during which they may have to pat search a suspect of the opposite sex. Cf. R. Lundman, *Police and Policing: An Introduction* 67-68, 87-88, 103-04, 115-16 (1980).

24. See Tjaden & Tjaden, *Differential Treatment of the Female Felon: Myth or Reality?*, in *Comparing Female and Male Offenders* 73-74 (M. Warren ed. 1981).

health care jobs. In 1980, there were 467,679 physicians in the United States, 54,284 (11.6%) of whom were women.²⁵ There are approximately 1,100,000 active R.N.s and 550,000 L.P.N.s in the United States,²⁶ over 95% of whom are women.²⁷ Both doctors and nurses have frequent intimate contact with patients.²⁸ Positions in other areas, such as physical therapy, radiology and prosthetics also require intimate viewing or touching of patients. If privacy interests defined by patient preference or community standards dictate employment opportunities in these fields, many of these positions will be closed to either women or men.

B. *Privacy Rights Implicated*

By hiring both men and women to fill contact positions, employers could expose countless prisoners, arrestees, patients, customers and co-workers to intimate touching and viewing by persons of the opposite sex. To maintain security, prison guards must watch inmates constantly—even while the prisoners shower, dress, sleep or use the toilet. To stop the flow of contraband in and out of prisons, guards strip prisoners and visually or manually search their naked bodies, including their genitals and their vaginal and anal body cavities.²⁹ Law enforcement officers frisk and sometimes strip search arrestees. Health care professionals dress, undress and bathe patients, help them use the toilet, examine all parts of their bodies and body cavities, insert catheters, shave genital hair in preparation for surgery and administer enemas and shots.³⁰ In industry, cleaning personnel may view co-workers or customers using bathrooms or changing clothes in locker rooms. Security guards frisk, search, or even strip search co-workers and customers. Finally, sales personnel touch customers to fit clothes and masseurs and masseuses touch customers to massage them.

Individuals have rights of privacy that protect them from unwanted exposure of their naked bodies to touching or viewing by strangers. Although privacy is a virtually undefinable concept³¹ any "plausible defi-

25. American Medical Ass'n, *Physician Characteristics and Distribution in the U.S.* 10 (1982).

26. U.S. Dep't of Health and Human Servs., *Source Book—Nursing Personnel* iii (1981).

27. United States Bureau of the Census, *Statistical Abstract of the United States*: 1985, at 102 (1984) (95.8% registered nurses are women); Lewis & Lewis, *The Potential Impact of Sexual Equality on Health*, 297 *New Eng. J. Med.* 863, 863 (1977) (97% registered nurses are women).

28. See *infra* note 30.

29. See National Institute of Justice, U.S. Department of Justice, *Women Employed in Corrections* 101-02 (1983).

30. See J.B. Lippincott Co., *The Lippincott Manual of Nursing Practice* 85-88, 416-17, 421-22, 482-85 (3d ed. 1982); S. Whitehead, *Nursing Care of the Adult Urology Patient* 39-45 (1970); Kilker & Wilkerson, *8-Point Postpartum Assessment*, *Nursing*, May 1973, at 56.

31. In *Whalen v. Roe*, 429 U.S. 589 (1977), the Supreme Court suggested that the right to privacy encompassed an individual's right to independent choice in "certain kinds of important decisions," *id.* at 599-600, including questions of "marriage, procrea-

tion" of privacy "must take the body as its first and most basic reference for control over personal identity."³² Courts have had little difficulty concluding that the right to privacy is implicated when an individual claims the right to control his or her own body³³ or complains about being touched or viewed while naked. "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figured [sic] from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."³⁴

tion, contraception . . . and child rearing." *Id.* at 600 n.26 (quoting *Paul v. Davis*, 424 U.S. 693, 713 (1976)). The right also encompasses a general "individual interest in avoiding disclosures of personal matters." *Id.* at 599. Commentators' definitions of privacy are equally broad. See, e.g., Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421, 428-29 (1980) ("[P]rivacy is a limitation of others' access to an individual. . . . A loss of privacy occurs as others obtain information about an individual, pay attention to him, or gain access to him. These three elements of secrecy, anonymity, and solitude are distinct and independent, but interrelated, and the complex concept of privacy is richer than any definition centered around only one of them."); Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L. L. Rev. 233, 236 (1977) (defining privacy in terms of autonomy, intimacy and identity); Gross, *Privacy and Autonomy*, in *Nomos XIII*, Privacy 169 (J. Pennock & J. Chapman eds. 1971) (privacy is "control over acquaintance with one's personal affairs") (emphasis in original); Gross, *The Concept of Privacy*, 42 N.Y.U. L. Rev. 34, 35-36 (1967) ("privacy is the condition of human life in which acquaintance with a person or with affairs of his life which are personal to him is limited") (emphasis omitted); Parker, *A Definition of Privacy*, 27 Rutgers L. Rev. 275, 281 (1974) ("privacy is control over when and by whom the various parts of us can be sensed by others") (emphasis omitted); Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 Calif. L. Rev. 1447, 1451-78 (1976) (privacy protects individuals from unwanted stimuli and intrusive observation, and grants them autonomy with respect to personal life choices).

Lawrence Tribe has suggested that a precise definition of privacy would be dysfunctional:

Society alters, some say evolves. Values change. Majorities grow more complacent; factions rigidify.

. . . Any fundamental rights of personhood and privacy too precisely or inflexibly defined defy the seasons and are likely to be bypassed by the spring floods. The best we can hope for is to encourage wise reflection—through strict scrutiny of any government action or deliberate omission that appears to transgress what it means to be human at a given time and place. Nothing less will yield a language and structure for creating a future continuous with and contiguous to the most humane designs of the past.

L. Tribe, *American Constitutional Law* 892-93 (1978).

32. Gerety, *supra* note 31, at 266 & n.119; see, e.g., L. Tribe, *supra* note 31, at 913 ("it is undeniable that the body constitutes the major locus of separation between the individual and the world and is in that sense the first object of each person's freedom"); Gavison, *supra* note 31, at 433 ("Individuals lose privacy when others gain physical access to them. Physical access here means physical proximity—that *Y* is close enough to touch or observe *X* through normal use of his senses.") (emphasis in original); Parker, *supra* note 31, at 281 (Privacy is "control over who can sense us" and "[b]y 'sensed,' is meant simply seen, heard, touched, smelled, or tasted. By 'parts of us,' is meant the parts of our bodies, our voices, and the products of our bodies.").

33. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (the right to privacy encompasses a woman's decision whether or not to terminate her pregnancy because she has a right to avoid the risk that maternity or additional offspring may impair her mental or physical health).

34. *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963), *cert. denied*, 376 U.S. 939

Bodily privacy rights spring from a variety of sources. The fourth amendment of the Constitution expressly grants the right to be secure from unreasonable body searches.³⁵ But we must look between the lines of that document to find protection from other forms of unwanted government viewing and touching. In *York v. Story*,³⁶ the Ninth Circuit relied on the due process clause of the fourteenth amendment to find that an assault victim's right to privacy was violated when a police officer photographed her in the nude and distributed the pictures to fellow officers.³⁷ The fourth amendment can be read to protect the privacy of the home and person "against all unreasonable intrusion of whatever character."³⁸ The Supreme Court, in *Roe v. Wade*,³⁹ relied on a variety of con-

(1964); see, e.g., *Schmerber v. California*, 384 U.S. 757, 769-70 (1966) ("The interests in human dignity and privacy which the Fourth Amendment protects forbid any . . . intrusions [beyond the body's surface] on the mere chance that desired evidence might be obtained."); *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891) ("[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others"); *Forts v. Ward*, 471 F. Supp. 1095, 1098 (S.D.N.Y. 1978) (despite limited nature of inmate's right of privacy, female inmate's right of privacy is invaded by male guard viewing her while she is using the toilet), *vacated in part on other grounds*, 621 F.2d 1210 (2d Cir. 1980); see also *Daily Times Democrat v. Graham*, 276 Ala. 380, 381-84, 162 So. 2d 474, 476-78 (1964) (publication of picture showing plaintiff with her dress blown up revealing her panties as she left fun house at county fair constituted invasion of privacy even though the picture was taken in public); *Commonwealth v. Wiseman*, 356 Mass. 251, 258-59, 249 N.E.2d 610, 615-16 (1969) (injunction issued to prevent public showing of film of insane persons at state correctional institution where they were shown naked or in pain and valid releases for film's exhibition were not supplied), *cert. denied*, 398 U.S. 960 (1970).

But even when unwanted bodily intrusions are involved, the limits of the right to privacy remain elusive.

[I]t is important to have a way of talking about these matters in which the intrusion caused by the police officer who gently shoves a person back to clear the way for an ambulance, for example, does not count even potentially as an invasion of privacy or personhood. To be sure, every such interference with liberty calls for some sort of justification. But it would demean the very concept of preferred rights to call upon government for a compelling showing of necessity, or indeed for anything more than a plausible account, in cases such as these.

L. Tribe, *supra* note 31, at 913.

35. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . .

U.S. Const. amend. IV.

36. 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).

37. *Id.* at 455-56.

38. *Poe v. Ullman*, 367 U.S. 497, 550 (1961) (Harlan, J., dissenting). In his dissenting opinion in *Poe v. Ullman*, which is cited with approval in Justice Goldberg's concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965), Justice Harlan stated,

I think the sweep of the Court's decisions, under both the Fourth and Fourteenth Amendments, amply shows that the Constitution protects the privacy of the home against all unreasonable intrusion of whatever character. '[These] principles . . . affect the very essence of constitutional liberty and security. They reach farther than [a] concrete form of the case . . . before the court, with its adventitious circumstances; they apply to all invasions on the part of the gov-

stitutional sources to find that a woman has a right to control her own body.

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as [1891], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . [T]he Court . . . [has] . . . found at least the roots of that right in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.⁴⁰

Courts faced with the conflict between equal employment and bodily privacy simply refer to constitutional privacy rights.⁴¹ Individuals also have common law and statutory rights to privacy that protect them from offensive intrusions into their physical or mental seclusion.⁴²

Whatever the source of the right to privacy, the right is not unlimited. Legitimate government goals can outweigh an individual's constitutional right to privacy,⁴³ and an otherwise tortious invasion of privacy is permissible if supported by an appropriate justification.⁴⁴ Thus, guards may visually inspect prisoners' body cavities⁴⁵ before and after they receive visitors without violating the prisoners' fourth amendment right to be free of unreasonable searches and seizures because the "significant and legitimate security interests of the institution" outweigh the prisoners'

ernment and its employees of the sanctity of a man's home and the privacies of life. . . . 'The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.'

367 U.S. at 550 (Harlan, J., dissenting) (citations omitted) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886) and *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)). Justice Harlan's remarks apply equally to the fourth amendment's protection of bodily privacy.

39. 410 U.S. 113 (1973).

40. *Id.* at 152-53 (citations omitted). See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973) (right to privacy guaranteed by the fourteenth amendment protects fundamental personal rights, including "personal intimacies").

41. See, e.g., *Hardin v. Stynchcomb*, 691 F.2d 1364, 1373 (11th Cir. 1982); *Backus v. Baptist Medical Center*, 510 F. Supp. 1191, 1193 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982); *Forts v. Ward*, 471 F. Supp. 1095, 1098 (S.D.N.Y. 1978), *vacated in part on other grounds*, 621 F.2d 1210 (2d Cir. 1980).

42. See *infra* notes 81-102 and accompanying text.

43. See, e.g., *Roe v. Wade*, 410 U.S. 113, 154 (1973).

44. See Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962, 1004 (1964); Nizer, *The Right of Privacy*, 39 Mich. L. Rev. 526, 560 (1941).

45. Body cavity searches are extremely intrusive. Prisoners are required to remove all of their clothes, bend over and spread the cheeks of their buttocks to expose their body cavities and genitals. See *Bell v. Wolfish*, 441 U.S. 520, 558 n.39 (1979); *Security & Law Enforcement Employers v. Carey*, 737 F.2d 187, 192 n.3 (2d Cir. 1984).

privacy interests.⁴⁶ Similarly, in the third trimester of pregnancy, the government's interest in the life and health of pregnant women and their unborn children outweighs a woman's rights to privacy, reproductive freedom and control over her body.⁴⁷ And, although inmates of a mental institution have a right to be free of tortious invasion of their personal privacy, films portraying inmates partially undressed and in embarrassing contortions can be shown to students and professionals interested in rehabilitation.⁴⁸ The public's interest in publicizing the inmates' plight to individuals who might be able to improve the conditions of their confinement outweighs their right to privacy.⁴⁹

Determining protected privacy rights requires a balancing process. Both the alleged privacy interests and the asserted government goals must be considered and weighed against each other.⁵⁰ A government goal that justifies placing guards where they can view prisoners showering may not be weighty enough to support a more intrusive policy that permits guards to conduct random body cavity searches. Thus, whether patients, arrestees, prisoners and customers have privacy interests entitled to protection cannot be determined out of context. Their interests must be balanced against the goals asserted to justify infringing on their privacy. Although third party rights are implicated in a variety of contexts,⁵¹ this Part examines only the rights of prisoners and patients. The analysis of prisoners' rights is equally applicable to other third parties who are compelled to submit to touching or viewing by opposite sex employees hired by government institutions. The examination of patients' rights in private hospitals applies equally to other third parties whose privacy interests are infringed by opposite sex employees hired by private employers in compliance with Title VII's equal employment mandate.

46. *Bell v. Wolfish*, 441 U.S. 520, 560 (1979).

47. *Roe v. Wade*, 410 U.S. 113, 162-63 (1973).

48. *Commonwealth v. Wiseman*, 356 Mass. 251, 262, 249 N.E.2d 610, 618 (1969), *cert. denied*, 398 U.S. 960 (1970). The Supreme Judicial Court of Massachusetts suggested that the film "would be instructive to legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields, and organizations dealing with the social problems of custodial care and mental infirmity." *Id.*, 249 N.E.2d at 618.

49. *Id.*, 249 N.E.2d at 618.

50. See L. Tribe, *supra* note 31, at 890-91. Compare *Terry v. Ohio*, 392 U.S. 1, 27-30 (1968) (brief detention and frisk of outer clothing justified by officer's suspicion that criminal activity is afoot and suspect is armed and dangerous) with *Schmerber v. California*, 384 U.S. 757, 770 (1966) (absent an emergency, probable cause and search warrant required to justify intrusions into the human body) and *United States v. Mastberg*, 503 F.2d 465, 470-71 (9th Cir. 1974) (in border search context, strip search is justified by suspicion that suspect is carrying contraband; body cavity search is justified only if there is a clear indication that suspect is carrying contraband).

51. See *supra* notes 29-30 and accompanying text.

1. Constitutional Privacy Rights

a. Prisoners

The Supreme Court has held that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."⁵² Prisons may restrict prisoners' rights, however, to the extent necessary to maintain security and achieve the "legitimate penological objectives of the corrections system."⁵³ Applying this test, the Court has concluded that because strip searches and visual body cavity searches are necessary to maintain security, they do not violate inmates' rights to be free of unreasonable searches.⁵⁴ Similarly, courts have held that because security needs outweigh prisoners' privacy interests, constant surveillance of prisoners is constitutionally permissible.⁵⁵ When prisons introduce opposite sex guards both sides of the balance may be affected. On the one hand, opposite sex guards may infringe inmates' privacy interests more than same sex guards. On the other hand, opposite sex guards are not necessary to maintain security. A prison's use of opposite sex guards may, therefore, violate prisoners' constitutional rights to privacy unless the Constitution permits the prison to justify the added infringement with legitimate goals other than maintaining security, goals such as promoting equal employment opportunity.⁵⁶

The majority of courts that have analyzed the privacy side of the balance have concluded that when opposite sex guards perform the touching and viewing duties necessary to maintain security, they infringe on prisoners' privacy interests more than if same sex guards perform those du-

52. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

53. *Pell v. Procunier*, 417 U.S. 817, 822 (1974); see *Hudson v. Palmer*, 104 S. Ct. 3194, 3200-01 (1984); *Bell v. Wolfish*, 441 U.S. 520, 546 (1979).

54. See *Bell v. Wolfish*, 441 U.S. 520, 560 (1979). In *Hudson v. Palmer*, 104 S. Ct. 3194 (1984), the Court once again dealt with the issue of prisoner privacy rights. Respondent Palmer, an inmate at a Virginia correctional facility, claimed that a random "shakedown" search of his prison locker violated his fourth amendment right to be free of unreasonable searches and seizures. *Id.* at 3196-97. The Court held that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and . . . the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." *Id.* at 3200.

The holding in *Hudson* does not apply to bodily rights of privacy, because *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), still governs. See *Hudson v. Palmer*, 104 S. Ct. 3194, 3216 n.31 (Stevens, J., dissenting) ("[the majority] believes that at least a prisoner's 'person' is secure from unreasonable search and seizure"); cf. *Grummett v. Rushen*, 779 F.2d 491, 496 n.3 (9th Cir. 1985) ("*Hudson* involved search of prisoner's 'personal effects, not his person'").

55. See *Hardin v. Stynchcomb*, 30 Fair Empl. Prac. Cas. (BNA) 564, 571 (N.D. Ga. 1980); see also *Hudson v. Palmer*, 104 S. Ct. 3194, 3201 (1984) (institutional security requires a "close and continual surveillance of inmates").

56. The Supreme Court, in *Pell v. Procunier*, 417 U.S. 817 (1974), indicated that prisoners retain constitutional rights that are "not inconsistent . . . with the legitimate penological objectives of the corrections system." *Id.* at 822. Because equal employment is not a penological objective, it may not provide a legitimate reason for infringing prisoners' rights.

ties.⁵⁷ In reaching this conclusion, courts have relied on three factors—history, community standards and prisoner preferences.⁵⁸ Thus, in *Forts v. Ward*,⁵⁹ the District Court for the Southern District of New York began its analysis by referring to the history of bodily privacy:

It is perfectly clear that men and women, from the beginning of recorded history, have had an innate need for privacy in certain areas of living. Virtually all societies—even those which have little requirement of clothing for adults and none for children—have rules for the concealing of female genitals.⁶⁰

Turning to current community standards, the court stated that,

[T]he norm in today's western world is to have enclosed toilet facilities in the home and segregated toilet facilities in public places which children are early taught to use. Even small children in the western world are expected to clothe themselves and keep their private parts covered. These societal rules become mandatory [sic] as one approaches adult status.⁶¹

Finally, the court relied on prisoners' preferences to support its conclusion that when same sex guards perform contact duties, they invade prisoner privacy less than when opposite sex guards perform the same duties. "It is appropriate to note that the women inmates have in the past accepted this inadvertent viewing [of female prisoners in the nude or on the toilet] without complaint when done by women guards."⁶²

On the other side of the balance, courts have concluded that the government interest in promoting equal employment opportunity does not outweigh the additional privacy infringement that results when prisons

57. See, e.g., *Hardin v. Stynchcomb*, 691 F.2d 1364, 1373 (11th Cir. 1982); *Bowling v. Enomoto*, 514 F. Supp. 201, 203-04 (N.D. Cal. 1981); *Hudson v. Goodlander*, 494 F. Supp. 890, 893 (D. Md. 1980); *Forts v. Ward*, 471 F. Supp. 1095, 1099-1101 (S.D.N.Y. 1978), *vacated in part on other grounds*, 621 F.2d 1210 (2d Cir. 1980).

58. Many courts conclude with very little analysis that contact by opposite sex employees infringes on the constitutional right to privacy more than contact by employees of the same sex. See *York v. Story*, 324 F.2d 450, 455 (1963) ("Nor can we imagine a more arbitrary police [invasion of] . . . privacy than for a male officer to unnecessarily photograph the nude body of a female citizen . . . over her protest . . . at a time when a female police officer could have been, but was not, called in for this purpose . . ."), *cert. denied*, 376 U.S. 939 (1964). One of the few cases to fully analyze the question is *Forts v. Ward*, 471 F. Supp. 1095 (S.D.N.Y. 1978), *vacated in part on other grounds*, 621 F.2d 1210 (2d Cir. 1980). This opinion relies on history, community standards and prisoner preferences to find that "it is an invasion of a female inmate's right of privacy for her to be viewed by a male guard while she is using the toilet—even if he is acting in the normal course of his duties." *Id.* at 1098. *Forts* is cited by many of the courts that fail to analyze the question themselves. See, e.g., *Bowling v. Enomoto*, 514 F. Supp. 201, 203-04 (N.D. Cal. 1981); *Hudson v. Goodlander*, 494 F. Supp. 890, 893 (D. Md. 1980).

59. 471 F. Supp. 1095 (S.D.N.Y. 1978), *vacated in part on other grounds*, 621 F.2d 1210 (2d Cir. 1980).

60. *Id.* at 1098.

61. *Id.*; cf. *Corn Prods. Co. Int'l v. Oil, Chem. & Atomic Workers Int'l Union*, 1970 Lab. Arb. Awards (CCH) ¶ 8432, at 4414 (1970) (Gross, Arb.) (relying on community standards to find unspecified right of privacy).

62. *Forts v. Ward*, 471 F. Supp. at 1098 n.11.

use opposite sex guards in contact positions.⁶³

These conclusions are not, however, unanimous. Some courts have held that once "viewing of urinating, defecating, or showering . . . is justified by the prison's need for security, the viewing is not demonstrably more significant whether by male or female."⁶⁴ In *Griffin v. Michigan Department of Corrections*,⁶⁵ the District Court for the Eastern District of Michigan attacked the argument that women must be barred from the housing units of a male prison. "[This argument] is based on stereotypical sexual characterization[s] that a viewing of an inmate while nude or performing bodily functions, by a member of the opposite sex, is intrinsically more odious than the viewing by a member of one's own sex."⁶⁶ The court found the argument unpersuasive for several reasons. The privacy rights of inmates are already seriously eroded; the guards did not view the prisoners to embarrass the prisoners or sexually gratify themselves; mores against being viewed naked by the opposite sex are changing; and the argument insults the professionalism of guards.⁶⁷ Finally,

63. See, e.g., *Forts v. Ward*, 621 F.2d 1210, 1217 (2d Cir. 1980); *Hudson v. Goodlander*, 494 F. Supp. 890, 893 (D. Md. 1980).

64. *Griffin v. Michigan Dep't of Corrections*, 30 Fair Empl. Prac. Cas. (BNA) 638, 647 (E.D. Mich. 1982) (quoting *In re Montgomery*, Nos. HC 446, HC 597, slip op. at 9 (Cal. Super. Ct. San Luis Obispo County Sept. 19, 1978) (order denying petition) (available in the files of the *Fordham Law Review*)).

Justice Marshall, dissenting in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), stated:

The appellants argue that restrictions on employment of women are also justified by consideration of inmates' privacy. It is strange indeed to hear state officials who have for years been violating the most basic principles of human decency in the operation of their prisons suddenly become concerned about inmate privacy. It is stranger still that these same officials allow women guards in contact positions in a number of nonmaximum-security institutions, but strive to protect inmates' privacy in the prisons where personal freedom is most severely restricted. I have no doubt on this record that appellants' professed concern is nothing but a feeble excuse for discrimination.

Id. at 346 n.5 (Marshall, J., dissenting); see *Gunther v. Iowa State Men's Reformatory*, 462 F. Supp. 952, 956 n.4 (N.D. Iowa 1979) (dictum) (whether inmates have constitutional privacy rights that protect them from opposite sex viewing is open to question), *aff'd*, 612 F.2d 1097 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980).

65. 30 Fair Empl. Prac. Cas. (BNA) 638 (E.D. Mich. 1982).

66. *Id.* at 647.

67. *Id.* Studies of prisoners' and guards' responses to integrating prison staffs provide additional support for concluding that the privacy interests asserted by prisons on behalf of prisoners are not legitimate or are so inconsequential that they are easily outweighed by equal employment goals. Female prison guards report less hostility from inmates than from male prison guards. Peterson, *Doing Time with the Boys: An Analysis of Women Correctional Officers in All-Male Facilities*, in *The Criminal Justice System and Women* 448-53 (B. Price & N. Sokoloff eds. 1982). This study showed a moderately positive attitude toward women correctional officers by inmates, with many neutral responses. *Id.* at 448. The same researchers concluded, however, on the basis of participant observation and interviews, that male officers respond with hostility to female officers. See *id.* at 448-53. Many men's prisons that employ women as guards in contact positions report few problems. See Woestendiek, *supra* note 17, at 6B, col. 3. That prisons apply their privacy policies inconsistently further erodes the credibility of asserted privacy interests. In some prison systems, women are barred from the residential units of male maximum security prisons while being permitted to hold lower paying guard positions throughout minimum

the court found the argument unacceptable because it "rests on assumptions and stereotypical sexual characteristics which have been expressly prohibited by Title VII."⁶⁸ By concluding that prisoners have no constitutional privacy interests that protect them from unwanted viewing or touching by guards of the opposite sex, these courts eliminate the conflict between equal employment and constitutional privacy rights.

The majority of courts have nonetheless concluded that prisoners have constitutional privacy rights that would be infringed by unrestricted hiring of opposite sex guards. This conclusion is not entirely free from question and should be re-examined. For example, courts could hold that employing opposite sex guards in contact positions does not violate prisoners' rights to privacy because the government's interest in promoting equal employment outweighs whatever additional privacy infringement the prison's use of opposite sex guards might entail.⁶⁹ This approach would resolve the conflict by elevating the interest in equal employment over prisoners' privacy rights. If prisoners do have protectable constitutional privacy rights, however, the scope of those rights has been defined by history, community standards and prisoner preferences.

b. *Patients*

A patient in a private hospital or nursing home has privacy interests protecting him from unwanted touching or viewing of his naked body. In *Backus v. Baptist Medical Center*,⁷⁰ the District Court for the Eastern District of Arkansas held that those interests are protected by the Constitution.⁷¹ Are patients' constitutional privacy rights implicated if Title

security institutions. See *Dothard v. Rawlinson*, 433 U.S. 321, 346 n.5 (1977) (Marshall, J., dissenting).

The mixed reactions of co-workers and prisoners as well as the inconsistent protection of asserted privacy rights may suggest either that the privacy interests prisons assert are a pretext for discrimination or that the asserted interests are so minimal that they are outweighed by administrative convenience or custom. In either case, equal employment rights take preference over such uncertain privacy interests.

68. *Griffin*, 30 Fair. Empl. Prac. Cas. (BNA) at 648.

69. Cf. *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3253 (1984) (government's interest in eradicating discrimination against females justifies infringement on male associational freedoms); *Madyun v. Franzen*, 704 F.2d 954, 956, 959-60 (7th Cir.) (equal employment opportunity for females outweighs prisoner's first amendment right not to be touched by females because it violates his religious beliefs), *cert. denied*, 464 U.S. 996 (1983).

70. 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982).

71. See *id.* at 1193. The court did not specify the basis for its opinion that patients have constitutional privacy rights. However, patients would argue that the federal government, through Title VII, has infringed on their constitutional right to privacy by mandating employment of opposite sex health care professionals.

Hospitals in such circumstances have standing to assert the constitutional privacy rights of patients. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 682-84 (1977) (mail order distributor of contraceptives has standing to assert the privacy rights of its customers because statutory sanctions are directed at distributor and because customers' constitutional rights would be "diluted or adversely affected" if distributor's constitu-

VII requires hospitals to employ medical personnel in positions requiring them to touch or view patients of the opposite sex? Not unless opposite sex nurses intrude on patient privacy more than same sex nurses. In this respect the privacy rights of patients and prisoners depend on the answer to the same question in different factual contexts—whether necessary touching and viewing is more intrusive when performed by members of the opposite sex than when performed by members of the same sex. But the analytical similarity ends there because prisons are governmental entities while most hospitals are privately owned and because prisoners are compelled to remain in prison while patients are free to choose their health care provider. This apparent absence of state compulsion necessitates a different analysis.

The question is not only whether opposite sex nurses invade privacy more than same sex nurses, but also whether Title VII unduly burdens privacy rights by requiring employers to hire opposite sex nurses. The government violates constitutionally protected privacy rights when it expressly delegates to others the authority to do what it is constitutionally prohibited from doing itself. Thus, the government can neither prohibit abortions⁷² nor delegate to others the authority to veto a woman's decision to abort.⁷³ But the Constitution does not prohibit all government regulations that interfere with constitutionally protected privacy rights—only those that unduly burden those rights.⁷⁴ A state may refuse, therefore, to provide medical benefits for abortions⁷⁵ or require notice to the

tional challenge fails); *Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976) (physicians have standing to challenge constitutionality of abortion statute because statutory sanctions are aimed at physicians); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (same); *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972) (unauthorized distributor of contraceptives has standing to assert the privacy interests of unmarried persons denied access to contraceptives because statutory sanctions were imposed against him, his relationship with such persons is that of an advocate of their rights and enforcement of the challenged statute against him will "materially impair the ability of single persons to obtain contraceptives"); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (Director of Planned Parenthood League has standing to assert the constitutional privacy rights of married people because statutory sanctions have been imposed against him, he has a confidential professional relationship with the people he seeks to represent and their privacy rights are likely to be diluted or adversely affected unless those rights are considered here). Title VII's sanctions are directed at hospitals and hospitals have a confidential professional relationship with their patients. Enforcement of Title VII to require equal employment of male and female nurses could infringe patient's constitutional privacy rights. Taken together, these facts support hospitals' standing to assert the constitutional privacy rights of their patients.

72. *Roe v. Wade*, 410 U.S. 113, 153-54 (1973). Of course, the right to abortion is not unqualified and the state "may go so far as to proscribe abortion . . . except when it is necessary to preserve the life or health of the mother" after viability. *Id.* at 163-64.

73. *Planned Parenthood v. Danforth*, 428 U.S. 52, 70 (1976) (state lacks "the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right"); see *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 439-42 (1983) (state may not require parental consent as a condition for abortion of an unmarried mature minor).

74. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685-86 (1977).

75. *Maher v. Roe*, 432 U.S. 464, 474 (1977) (a state may refuse to provide medical

parents of a pregnant minor planning to abort.⁷⁶ As the Supreme Court has noted, "even a burdensome regulation may be validated by a sufficiently compelling state interest."⁷⁷

In *Backus*, the court found constitutional privacy rights for patients without considering whether Title VII unduly burdens patients' privacy rights by mandating male obstetrics nurses.⁷⁸ Had it addressed the issue, it might have changed its conclusion. A guard searching a prisoner forcibly intrudes on his bodily privacy rights. That intrusion must be justified by a compelling state interest. But a male obstetrics nurse mandated by Title VII does not forcibly intrude on a female patient's bodily privacy rights. She can refuse to consent to this treatment and either request a different nurse, change health care providers or go untreated. Mandating male obstetrics nurses forces some patients to make this choice to avoid being treated by a male nurse. But the effect on patient privacy rights is minimal when compared with regulations condemned as unduly burdensome in other privacy cases, regulations delegating to husbands or parents an absolute veto power over a woman's decision whether to abort.⁷⁹ Statutorily mandated male nurses burden patient privacy no more than regulations that have been permitted in abortion cases, regulations denying funding or requiring parental notice. Even if mandating male obstetrics nurses could be characterized as unduly burdensome it could still be justified by the government's interest in promoting equal employment.

The *Backus* court asserted that patients have constitutional privacy rights that would be infringed by statutorily mandated equal employment.⁸⁰ This conclusion should be re-examined because statutorily mandated equal employment may not burden patient privacy enough to establish a constitutional violation. If patients have protectable constitutional privacy rights, the scope of those rights is defined by patient preferences which, in turn, reflect history and community standards.

2. Common Law Privacy Rights

a. Patients

Patients have common law privacy rights that may deserve protection.⁸¹ "One who intentionally intrudes, physically or otherwise, upon

benefits for abortions because such a "regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion").

76. *H.L. v. Matheson*, 450 U.S. 398, 411 (1981) (statute requiring notice to parents of minor prior to abortion is constitutional because it "gives neither parents nor judges a veto power over the minor's abortion decision").

77. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); *cf. Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3252-53 (1984) (compelling state interest in invalidating sex discrimination justifies burdening individual's associational rights).

78. *Backus v. Baptist Medical Center*, 510 F. Supp. 1191, 1193 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982).

79. See *supra* note 73 and accompanying text.

80. See *Backus*, 510 F. Supp. at 1193.

81. Tort privacy rights, unlike constitutional privacy rights, may be violated by pri-

the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."⁸² Invasion of privacy by intrusion requires an invasion of "something secret, secluded or private pertaining to the plaintiff."⁸³ Patients also have a common law right to be free from actual or threatened offensive bodily contact. The Second Restatement of Torts provides that someone who "acts intending to cause a[n] . . . offensive contact with [a] person . . . or an imminent apprehension of such a contact" is liable for assault if he causes his victim to fear an offensive contact.⁸⁴ That person is liable for battery as well if he also causes the contact.⁸⁵ Courts have readily found that viewing or touching a naked person constitutes an invasion of privacy,⁸⁶ an assault

vate citizens without any state action. See Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 Yale L.J. 1577, 1584 n.42 (1979) ("A crucial distinction between the two types of rights is that the common law right operates as a control on private behavior, while the constitutional right operates as a control on government. The two rights are necessarily different because our concept of appropriate behavior for private persons and government officials is different.").

82. Restatement (Second) of Torts § 652B (1977). Although intentional torts vary from state to state, see *Banks v. King Features Syndicate*, 30 F. Supp. 352, 354 (S.D.N.Y. 1939), the Restatement represents the majority rule. That individuals have a right to privacy protected by the common law was first suggested by Samuel Warren and Louis Brandeis in *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). Warren and Brandeis primarily discussed unauthorized publication of private information. William L. Prosser in *Privacy*, 48 Calif. L. Rev. 383 (1960), reviewed the caselaw and concluded that the rights encompassed four separate tort rights:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Id. at 389. Professor Prosser's four privacy invasions subsequently became part of the Restatement. See Restatement (Second) of Torts §§ 652B-652E (1977). Prosser identified 26 states that affirmatively recognized a right of privacy in one form or another and 2 states that were about to recognize it. In addition, 4 states protected the right by statute and only 4 states had specifically rejected the existence of the right. Prosser, *supra*, at 386-88. By 1979, recognition of the right of privacy was considered virtually universal. Felcher & Rubin, *supra* note 81, at 1582. Only Minnesota, Nebraska and Wisconsin had refused to recognize the right by either common law or statute. *Id.* at 1582 & n.32.

83. Prosser, *supra* note 82, at 407.

84. Restatement (Second) of Torts § 21 (1965).

85. *Id.* § 18; see *Bowman v. Home Life Ins. Co. of Am.*, 243 F.2d 331, 333 (3d Cir. 1957); *Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523, 529 (D.D.C. 1981); cf. *Commonwealth v. Gregory*, 132 Pa. Super. 507, 512-13, 1 A.2d 501, 503 (1938) (criminal case).

86. See, e.g., *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."); *Commonwealth v. Wiseman*, 356 Mass. 251, 258-59, 249 N.E.2d 610, 615 (1969) (injunction granted to protect mental hospital inmates from invasion of privacy inherent in unrestricted display of film showing inmates in degrading situations including nakedness), *cert. denied*, 398 U.S. 960 (1970); *De May v. Roberts*, 46 Mich. 160, 165-66, 9 N.W. 146,

or a battery.⁸⁷

Absence of consent, however, is a prerequisite to liability for any of these torts.⁸⁸ Thus, although many of the procedures and treatments ordinarily performed and administered by nurses and doctors on patients would be tortious acts absent consent, they are not actionable because the patient has consented either expressly or by implication. Express consent may be oral or written,⁸⁹ or apparent from the patient's conduct.⁹⁰ In an emergency, medical personnel may treat a patient without any manifestation of consent because consent is presumed if the patient is unable to give consent, no relative is available to give consent, the treatment is clearly to the patient's advantage and there is no reason to believe that consent would be withheld.⁹¹

149 (1881) (presence of layman in apartment during delivery of child violates plaintiff's right to privacy); *cf.* *Daily Times Democrat v. Graham*, 276 Ala. 380, 380-84, 162 So. 2d 474, 474-78 (1964) (publication of photograph of plaintiff with dress blown up by fan violated plaintiff's right of privacy); *Byfield v. Candler*, 33 Ga. App. 275, 277, 125 S.E. 905, 906 (1924) (plaintiff's privacy violated if defendant entered her stateroom without her consent when her door was shut, her husband was absent and she was in bed).

87. *See, e.g.,* *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 252 (1891) ("To compel any one . . . to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass."); *Bowman v. Home Life Ins. Co. of Am.*, 243 F.2d 331, 333 (3d Cir. 1957) (physical examination of mother and daughter by insurance agent posing as doctor constitutes "an offensive bodily contact"); *Inderbitzen v. Lane Hosp.*, 124 Cal. App. 462, 468, 12 P.2d 744, 747 (1932) (needless and rude intimate physical examinations of pregnant women by numerous medical students and doctors over patient's objection "constituted an assault upon her or trespass to her person"); *Estate of Berthiaume v. Pratt*, 365 A.2d 792, 793-96 (Me. 1976) (raising dying man's head to position him for pictures constitutes an assault and battery if unauthorized); *cf.* *Commonwealth v. Gregory*, 132 Pa. Super. 507, 512-16, 1 A.2d 501, 503-05 (1938) (examination of amputee's leg with fraudulently obtained consent constitutes criminal assault and battery).

88. *See, e.g.,* *Inderbitzen v. Lane Hosp.*, 124 Cal. App. 462, 468, 12 P.2d 744, 747 (1932); *Byfield v. Candler*, 33 Ga. App. 275, 277, 125 S.E. 905, 906 (1924); *Estate of Berthiaume v. Pratt*, 365 A.2d 792, 796 (Me. 1976); *De May v. Roberts*, 46 Mich. 160, 165-66, 9 N.W. 146, 149 (1881); *see also* *Nelson v. Patrick*, 58 N.C. App. 546, 548-50, 293 S.E.2d 829, 831-32 (1982) (lack of informed consent for medical procedures can give rise to a cause of action for negligence).

89. It has been held that surgery on a person is a technical battery or trespass unless the patient or some authorized person consented to it, regardless of the skill and care used. *See* *Gray v. Grunnagle*, 423 Pa. 144, 157, 223 A.2d 663, 669 (1966) (quoting *Powell, Consent to Operative Procedures*, 21 Md. L. Rev. 189, 191 (1961)); *Physicians' & Dentists' Business Bureau v. Dray*, 8 Wash. 2d 38, 40, 111 P.2d 568, 569 (1941); *Annas, The Hospital: A Human Rights Wasteland*, 1 Civ. Lib. Rev. 9, 13 (Fall 1974); *cf.* *Prosser, supra* note 84, at 420 (statutes allowing individuals to consent to what would otherwise be privacy invasions require the consent to be given in writing).

90. *Restatement (Second) of Torts* § 50 & ill. (1965); *Restatement (Second) of Torts* § 892 (1979). A general authorization to a physician to use his own judgment may supply a sufficient consent to procedures later employed. Where express consent cannot be obtained, implied consent will be found and no liability for unauthorized treatment will result where treatment is required by sound medical or surgical procedure. *See* *Estate of Berthiaume v. Pratt*, 365 A.2d 792, 796 (Me. 1976) (consent may be inferred from the patient's consent to enter into a physician-patient relationship when touching is reasonably necessary for diagnosis and treatment of the patient's ailments).

91. *Restatement (Second) of Torts* § 62 ill. 3 & 4 (1965); *Restatement (Second) of*

To find an intrusion, assault or battery when the medical practitioner is of a different sex than the patient, a court would need to find that the patient did not consent to the treatment. Because patients who silently accept treatment or who receive emergency treatment while unconscious will be held to have consented to necessary medical treatment, the sex of the health practitioner should be relevant only when the patient expressly objects to treatment by an opposite sex practitioner and the practitioner treats the patient over his or her express objection. Thus, in *Fesel v. Masonic Home, Inc.*,⁹² the District Court for the District of Delaware held that because nearly half of the home's female patients would object to personal care by a male nurse's aide the home could not force them to accept that treatment without violating their common law privacy rights.⁹³

It could be argued that such conduct is not tortious because conflicting social goals favoring equal employment opportunity for men outweigh patients' common law privacy rights.⁹⁴ Patients' inconsistent preferences regarding treatment by opposite sex health professionals⁹⁵ may suggest that their concern for privacy is not very strong. Alternatively, their preferences, although grounded in traditional role expectations, may nonetheless be strong and entitled to protection. Case law reveals that although hospitals assert patients' privacy rights in equal employment

Torts § 892D (1979). Emergency conditions in which immediate action is needed to protect life may justify an inference of consent to medical or surgical treatment where it is impractical to obtain actual consent from the patient or one authorized to consent for him. See, e.g., *Danielson v. Roche*, 109 Cal. App. 2d 832, 833-35, 241 P.2d 1028, 1029-30 (1952) (no recourse against doctor who removed allegedly diseased fallopian tubes during appendectomy where patient signed general consent and condition was discovered during surgery).

92. 447 F. Supp. 1346 (D. Del. 1978), *aff'd mem.*, 591 F.2d 1334 (3d Cir. 1979).

93. *Id.* at 1352; see *Backus v. Baptist Medical Center*, 510 F. Supp. 1191, 1195 (E.D. Ark. 1981) ("The fact that the plaintiff is a health care professional does not eliminate the fact that he is an *unselected individual* who is intruding on the obstetrical patient's right to privacy. The male nurse's situation is not analogous to that of the male doctor *who has been selected* by the patient.") (emphasis in original), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982); *Inderbitzen v. Lane Hosp.*, 124 Cal. App. 462, 468, 12 P.2d 744, 747 (1932) ("A physician or a medical student has no more right to needlessly and rudely lay hands upon a patient against her will than has a layman.").

94. Even Professors Freed and Polsby, who argue for a broadened bfoq defense to accommodate widely held social norms, see *infra* note 159, remark that,

[g]iven the concrete and symbolic costs it imposes, it is a fair question whether the modesty/privacy custom has not outlived its usefulness and should now be discarded. After all, however ingrained it may be, the custom of sex segregation for reasons of privacy is hardly intrinsic in human nature. Not all civilized cultures observe our modesty customs (although they all observe *some* customs whose effect if not purpose it is to hold men and women apart); and in many areas we have committed ourselves to change our customs when they prove to be unfair.

Freed & Polsby, *Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment*, 1981 Am. B. Found. Research J. 585, 597 (1981) (footnote omitted) (emphasis in original).

95. See *infra* notes 97-99 and accompanying text.

cases, patients who litigate complaints regarding intimate viewing or touching associated with health care invariably complain about the professional status of the actor, not the actor's sex.⁹⁶ The absence of litigation by patients regarding the sex of their health practitioner may mean that medical personnel ordinarily respect privacy objections to treatment or it may mean that patients are not litigious regarding their privacy rights.⁹⁷ If so, the absence of complaints proves nothing regarding the legitimacy of patient privacy concerns. Alternatively, it may mean that patients do not object to treatment by medical personnel of the opposite sex as long as they are qualified professionals.⁹⁸ If so, the concern for patient privacy is unfounded.⁹⁹

Patients have common law privacy rights protecting them against unwanted intimate touching or viewing. Because absence of consent is a

96. For example, in *Knight v. Penobscot Bay Medical Center*, 420 A.2d 915 (Me. 1980), the plaintiff complained that her right to privacy was violated because her nurse's husband, a layperson, watched through the delivery room window while she gave birth to her baby. *Id.* at 916. Similarly, in *Bowman v. Home Life Ins. Co. of Am.*, 243 F.2d 331 (3d Cir. 1957), a mother and daughter sought damages for assault and battery because an insurance agent, posing as a physician, physically examined them to verify their statements on an insurance application. *Id.* at 332-33; see, e.g., *Inderbitzen v. Lane Hosp.*, 124 Cal. App. 462, 464, 12 P.2d 744, 745-46 (1932) (plaintiff complained that men who treated her were medical students and not licensed physicians); *De May v. Roberts*, 46 Mich. 160, 161, 9 N.W. 146, 146 (1881) (plaintiff complained that presence of male layperson in room during birth of her baby was an assault or violated her right to privacy); cf. *Commonwealth v. Gregory*, 132 Pa. Super. 507, 509-10, 1 A.2d 501, 502-03 (1938) (plaintiff claimed assault and battery because minister posing as doctor representing artificial limb manufacturer examined her thigh and leg).

97. Ruth Gavison, in her article *Privacy and the Limits of the Law*, 89 Yale L.J. 421 (1980) states:

[L]egal protection of privacy has always had, and will always have, serious limitations. In many cases, the law cannot compensate for losses of privacy, and it has strong commitments to other ideals that must sometimes override the concern for privacy. Consequently, one cannot assume that court decisions protecting privacy reflect fully or adequately the perceived need for privacy in our lives.

Part of the reason for this inadequate reflection is that in many cases actions for such invasions are not initiated. The relative rarity of legal actions might be explained by expectations that such injuries are not covered by law, by the fact that many invasions of privacy are not perceived by victims, and by the feeling that legal remedies are inappropriate, in part because the initiation of legal action itself involves the additional loss of privacy. When these factors are forgotten, it is easy to conclude that privacy is not such an important value after all. This conclusion is mistaken, however. . . . Understanding the difficulty of legal protection of privacy will help us resist the tendency to fall victim to this misperception.

Id. at 456-57.

98. One recent study regarding male patients' acceptance of intimate treatment by female physicians concluded that "female physicians are as well accepted by male patients in the performance of vasectomy as male physicians are." Berg, *Vasectomy Patients' Acceptance of Female Physicians*, 9 J. Fam. Prac. 1107, 1108 (1979). In another study, male nurses "reported acceptance by patients, with just a few rejections from older women patients." Bush, *The Male Nurse: A Challenge to Traditional Role Identities*, 15 Nursing Forum 390, 400 (1976).

99. But see *supra* note 97.

necessary prerequisite to a violation of these rights, their scope is defined by patient preferences. Patients' common law privacy rights are entitled to legal protection unless they are outweighed by conflicting social goals favoring equal employment.

b. *Prisoners*

Prisoners also have common law privacy rights that could conflict with equal employment. If a guard forcibly searches a prisoner, the guard or the prison could be liable for an invasion of privacy, an assault or a battery.¹⁰⁰ Prisoners, however, must overcome a number of obstacles to establish tort liability. First, they may be barred from suing for damages because both the guard and the prison may be immune from suit.¹⁰¹ Second, a guard's conduct will be justified if it is reasonably necessary to maintain prison security.¹⁰² Whether an otherwise reasonable body search of a prisoner becomes actionable when conducted by an opposite sex guard depends first on whether that search infringes on the

100. Prisoners would not normally sue for invasion of privacy under common law, due to a number of obstacles, including the doctrine of sovereign immunity. See *infra* note 102. The majority of prisoner suits have been brought under 42 U.S.C. § 1983. See, e.g., Grummett v. Rushen, 779 F.2d 491, 492 (9th Cir. 1985); Batton v. State Gov't, 501 F. Supp. 1173, 1175-76 (E.D.N.C. 1980); Hudson v. Goodlander, 494 F. Supp. 890, 891 (D. Md. 1980). However, there is not an absolute ban on prisoner suits against prisons or guards for torts committed against the inmates while in prison. See, e.g., Roberts v. State, 159 Ind. App. 456, 464-65, 307 N.E.2d 501, 506 (1974); Polizzi v. Trist, 154 So. 2d 84, 85 (La. Ct. App. 1963); Restatement (Second) of Torts § 133 (1965); cf. Peters v. White, 103 Tenn. 390, 394-95, 53 S.W. 726, 726-27 (1899) (superintendent of workhouse liable for battery due to striking occupant).

101. Traditionally, under the doctrine of sovereign immunity, prison officials are entitled to immunity from tort liability when engaging in governmental functions. Kish v. Montana State Prison, 161 Mont. 297, 299, 505 P.2d 891, 892 (1973); see Civil Actions Against State Government §§ 2.2, 2.29, 2.36, 2.44, 2.45 (W. Winborne ed. 1982). It has been held, however, that intentional torts are not governmental functions for purposes of sovereign immunity. See Shunk v. State, 97 Mich. App. 626, 628, 296 N.W.2d 129, 130 (1980). A state may waive its immunity from suit, but waiver is limited to those torts expressly enumerated in the waiver statute. See Storch v. Board of Directors of E. Mont. Region Five Mental Health Center, 169 Mont. 176, 180, 545 P.2d 644, 647 (1976) (statutory waiver of immunity limited to common law tort actions does not permit actions for libel and invasion of privacy). A government official performing discretionary acts within the scope of his or her official capacity also may be entitled to a qualified immunity from liability for injurious acts. Bogard v. Cook, 586 F.2d 399, 412-13 (5th Cir. 1978), cert. denied, 444 U.S. 883 (1979); Gray v. Linahan, 157 Ga. App. 227, 228-29, 276 S.E.2d 894, 896 (1981); see Civil Actions Against State Government, *supra*, § 6.11.

Courts frequently lift the bar of immunity from actions for declaratory or injunctive relief. See Civil Actions Against State Government, *supra*, § 2.29, at 58-60. The federal government has waived immunity for invasion of privacy actions, see, e.g., Black v. Sheraton Corp. of Am., 564 F.2d 531, 539, 541 (D.C. Cir. 1977); Socialist Workers Party v. Attorney General, 463 F. Supp. 515, 524 (S.D.N.Y. 1978), but not for assault and battery actions, see Federal Tort Claims Act, 28 U.S.C. § 2680(h) (1982).

102. See, e.g., Hudson v. Goodlander, 494 F. Supp. 890, 892 (D. Md. 1980); Hodges v. Klein, 412 F. Supp. 896, 900 (D.N.J. 1976); Restatement (Second) of Torts § 134 (1965); cf. Gettleman v. Werner, 377 F. Supp. 445, 451-52 (W.D. Pa. 1974) (warrantless strip search justified by state's great interest in prison security).

privacy interests of the prisoner more than a search by a guard of the same sex, and second on whether the additional infringement, if any, can be justified by the government's interests in promoting equal employment opportunity.

Thus, prisoners' common law privacy rights, like prisoners' constitutional privacy rights, depend not on whether the prisoner consented, but on whether forcible touching or viewing by a guard of the opposite sex is justified as reasonably necessary to maintain prison security.

3. Conclusion

The majority of courts considering the issue have concluded, with little analysis, that prisoners, patients, arrestees and other third parties have privacy rights that are implicated when employers hire both men and women to fill contact positions. This conclusion, however, is not entirely free from question. Statutorily mandating opposite sex nurses in private health care facilities may not even implicate patients' constitutional privacy rights. If such rights are involved, it is not at all certain that patient privacy interests would be burdened enough to establish a violation. In prisons, where prisoners are forced to submit to intimate touching and viewing, some courts have suggested that necessary viewing and touching by opposite sex guards does not infringe on prisoner privacy any more than identical conduct by same sex guards.

As to common law rights, patients have the prerogative to be free from unwanted touching and viewing, but this freedom may be outweighed by conflicting social goals favoring equal employment opportunity. Prisoners also have common law privacy rights but their interests may be outweighed by prison security needs.

Unless equal employment infringes on protected privacy interests, no conflict between equal employment and privacy rights arises at all. Courts should, therefore, look more closely at the validity of asserted privacy interests before denying equal employment opportunity. Even after careful analysis, courts may conclude that equal employment infringes on the privacy interests of third parties. Whether derived from the Constitution or grounded in the common law, the scope of these privacy interests is defined by history, community standards and customer preferences. The remainder of this Article proposes an approach for resolving the conflict between these privacy interests and equal employment rights.

II. CURRENT CASE LAW: THE THEORY AND ITS FLAWS

How have the courts responded to conflicts between equal employment and privacy? Virtually every court faced with the issue has applied the same legal analysis. After finding that the employer has intentionally

discriminated on the basis of sex,¹⁰³ the courts determine whether sex is a bfoq for the position in question. The statutory bfoq defense is the only defense available to employers who intentionally discriminate. It permits employers to discriminate on the basis of sex whenever sex is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."¹⁰⁴ The defense, which courts have construed narrowly, is available only if "the *essence* of the business operation would be undermined by not hiring members of one sex exclusively"¹⁰⁵ and the employer can show "a factual basis for believing, that all or substantially all [members of one sex] would be unable to perform safely and efficiently the duties of the job."¹⁰⁶ Courts faced with conflicting equal employment and privacy interests have added a second prong to the bfoq test. They have held that in some circumstances an employer may justifiably discriminate on the basis of sex in order to protect third party privacy interests.¹⁰⁷ To qualify for this version of the defense the employer must demonstrate that the conflict between equal employment and privacy is unavoidable.¹⁰⁸

103. See, e.g., *Hardin v. Stynchcomb*, 691 F.2d 1364, 1369-70 (11th Cir. 1982) (employer's policy of assigning all new deputies to work in the county jail and reserving almost all positions in the county jail for males constituted overt discrimination against women); *Brooks v. ACF Indus.*, 537 F. Supp. 1122, 1123-24 (S.D. W. Va. 1982) (employer admits it transferred female out of the janitorial department because of her sex); *EEOC v. Mercy Health Center*, 29 Fair Empl. Prac. Cas. (BNA) 159, 160-61 (W.D. Okla. 1982) (employer permitted to discriminate on the basis of sex by refusing to hire males as staff nurses in labor and delivery); *Harden v. Dayton Human Rehab. Center*, 520 F. Supp. 769, 771, 776-77 (S.D. Ohio 1981) (by issuing an occupational qualification prohibiting females from working as specialists in the male quarters of the rehabilitation center, the employer concededly discriminated on the basis of sex); *Backus v. Baptist Medical Center*, 510 F. Supp. 1191, 1192-93 (E.D. Ark. 1981) (employer acknowledges intentionally restricting nursing positions in labor and delivery sections to females and asserts a bfoq defense), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982); *Saunders v. Hercules, Inc.*, 510 F. Supp. 1137, 1139 (W.D. Va. 1981) (plaintiff established a prima facie case of discrimination because the parties stipulated that if he had been a female, he would not have been discharged from his position as a guard at the employer's plant); *Gunther v. Iowa State Men's Reformatory*, 462 F. Supp. 952, 954-55 (N.D. Iowa 1979) (defendants admitted discriminating on the basis of sex by refusing to hire a female as a correction officer), *aff'd*, 612 F.2d 1079 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); *Fesel v. Masonic Home, Inc.*, 447 F. Supp. 1346, 1349 (D. Del. 1978) (plaintiff established a prima facie case of sex discrimination by demonstrating that the nursing home rejected his application for a nurse's aide position because he was male), *aff'd mem.*, 591 F.2d 1334 (3d Cir. 1979); *Sutton v. National Distillers Prods. Co.*, 445 F. Supp. 1319, 1327 (S.D. Ohio 1978) (company relieved plant guard of her duty to search employees because she was a female), *aff'd*, 628 F.2d 936 (6th Cir. 1980); *Reynolds v. Wise*, 375 F. Supp. 145, 151 (N.D. Tex. 1974) (prison policy that only males shall be appointed in institutions for men discriminated against women).

104. 42 U.S.C. § 2000e-2(e)(1) (1982).

105. *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir.) (emphasis in original), *cert. denied*, 404 U.S. 950 (1971).

106. *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

107. See *supra* note 8.

108. See, e.g., *Hardin v. Stynchcomb*, 691 F.2d 1364, 1370-71 (11th Cir. 1982); *Griffin v. Michigan Dep't of Corrections*, 30 Fair Empl. Prac. Cas. (BNA) 638, 646 (E.D. Mich. 1982); *Harden v. Dayton Human Rehab. Center*, 520 F. Supp. 769, 779 (S.D. Ohio 1981);

Thus, in *Harden v. Dayton Human Rehabilitation Center*,¹⁰⁹ the District Court for the Southern District of Ohio required the prison to hire a woman as a rehabilitation specialist in the male quarters of the center even though the employer contended that such an assignment would violate inmate privacy. The court reasoned that although sex (male) would be a bfoq for performing strip searches or for supervising inmates showering in open shower stalls, the employer could remove these duties from the job description for female rehabilitation specialists.¹¹⁰ The court went on to suggest that the prison could install doors on the shower stalls to permit females to supervise inmate showers.¹¹¹ To enhance privacy in the dormitories, the court suggested comparable accommodations to eliminate potential privacy infringements by either sex.¹¹² Other opinions have reached similar results.¹¹³

These apparently equitable results mask the flaws in the current majority approach. First, in determining whether the employer is asserting a valid bfoq based on privacy, the courts often fail to examine the validity of the asserted privacy interests. Instead, they accept the employer's position without full analysis or take judicial notice that viewing or touching by the opposite sex constitutes an unacceptable privacy infringement.¹¹⁴ As already discussed in Part I, the employers' position is open to question. Viewing or touching members of the opposite sex may not constitute a greater privacy infringement than identical invasion by members of the same sex¹¹⁵ and unless the asserted privacy interests are entitled to legal protection, the employer has no basis for claiming the bfoq defense even if that defense is defined to protect third party privacy interests.

Second, by embracing third party privacy interests, the lower courts have unduly broadened the bfoq defense, a defense that the Supreme

Backus v. Baptist Medical Center, 510 F. Supp. 1191, 1195-96 (E. D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982); *Fesel v. Masonic Home, Inc.*, 447 F. Supp. 1346, 1351 (D. Del. 1978), *aff'd mem.*, 591 F.2d 1334 (3d Cir. 1979); EEOC Dec. No. 82-4, 28 Fair Empl. Prac. Cas. (BNA) 1845, 1847 (1982).

109. 520 F. Supp. 769 (S.D. Ohio 1981).

110. *See id.* at 779.

111. *See id.* at 780.

112. *See id.*

113. *See, e.g.*, *Hardin v. Stynchcomb*, 691 F.2d 1364, 1373 (11th Cir. 1982) (modifying system of rotating deputy sheriff assignments); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086-87 (8th Cir.) (modifying job classifications), *cert. denied*, 446 U.S. 966 (1980); *Hudson v. Goodlander*, 494 F. Supp. 890, 893-94 (D. Md. 1980) (selective work assignments); *Forts v. Ward*, 471 F. Supp. 1095, 1100-01 (S.D.N.Y. 1978) (structural modifications and selective work assignment), *vacated in part*, 621 F.2d 1210 (2d Cir. 1980).

114. *See, e.g.*, *Carey v. New York State Human Rights Appeal Bd.*, 61 A.D.2d 804, 805, 402 N.Y.S.2d 207, 208 (1978) ("our own judicial common sense makes it clear that the [bona fide occupational] qualification [based on sex] is required"), *aff'd mem.*, 46 N.Y.2d 1068, 390 N.E.2d 301, 416 N.Y.S.2d 794 (1979). *See supra* notes 58, 71 and accompanying text.

115. *See supra* notes 64-69, 94-99 and accompanying text.

Court has interpreted as "an extremely narrow exception to the general prohibition of discrimination on the basis of sex."¹¹⁶ The lower courts have devised a variety of tests for applying Title VII's bfoq defense.¹¹⁷ Every formulation other than the privacy exception requires that sex can be a bfoq only if all or substantially all members of the excluded sex are unable to perform essential duties "reasonably necessary to the normal operation" of the business.¹¹⁸ Although duties that require an employee to invade someone's privacy almost always are essential duties of the disputed job,¹¹⁹ privacy concerns rarely render the rejected sex unable to perform these essential duties. Male nurses are capable of examining female obstetrics patients. Female salespersons can fit male customers. Male guards can maintain security in a female prison. To bring privacy interests within the bfoq defense, courts have expanded the defense to permit employers to discriminate against individuals despite their uncontested ability to perform the job. By expanding the defense to encompass privacy interests, courts permit employers to discriminate on the basis of customer preferences and community standards regarding appropriate male and female jobs.

This result is neither required by the statute nor necessary to protect third party privacy interests. Both the legislative history of the defense¹²⁰ and the Equal Employment Opportunity Commission's (EEOC)

116. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977); see *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 547 (1971) (Marshall, J., concurring) (Congress intended the bfoq defense to be limited).

117. The Fifth Circuit developed an early definition of the bfoq defense in *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969). The *Weeks* court held that to establish a bfoq defense, the employer must show that "all or substantially all women" cannot safely and efficiently perform the job. *Id.* at 235. The majority of the Supreme Court in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam) took a similar approach, prohibiting application of the bfoq defense to restrict the employment of women with children unless "conflicting family obligations . . . [are] demonstrably more relevant to job performance for a woman than for a man." *Id.* at 544. Justice Marshall's concurring opinion in *Phillips* took a narrower view of the defense, limiting it to those instances where an employee's sexual characteristics are essential to successful job performance. *Id.* at 545-47 (Marshall, J., concurring). This narrow view of the defense was also articulated by the Ninth Circuit in *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1224-25 (9th Cir. 1971), and by the Seventh Circuit in *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 717-18 (7th Cir. 1969). Under this approach, even if a majority of the members of one sex cannot perform a job, each individual job applicant must be allowed to demonstrate his or her ability to perform. More recently, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Supreme Court emphasized that the defense is "extremely narrow" and stated that "[employers may not discriminate] on the basis of stereotyped characterizations of the sexes." *Id.* at 333-34. The Court noted the various definitions of the defense that the lower courts have adopted, see *id.* at 333, but neither adopted an existing formulation nor developed a definition of its own.

118. 42 U.S.C. § 2000e-2(e) (1982); see also Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 Geo. L.J. 641, 679-81 (1981) (fetal protection cannot be the basis for bfoq defense as it is unrelated to job performance). See *supra* note 116.

119. See *supra* text accompanying notes 29-30.

120. Senators Clark and Case, floor managers of the Civil Rights Bill, submitted an

interpretation of the defense¹²¹ reinforce its narrow scope. Although the words "reasonably necessary" could be read broadly to protect third party privacy interests,¹²² and this reading finds some support in the legislative history, nothing in the language or history of the statute mandates this interpretation.¹²³ Nor is this interpretation necessary to

Interpretive Memorandum on Title VII that referred to the bfoq defense as a "limited right to discriminate." 110 Cong. Rec. 7213 (1964).

121. See 29 C.F.R. § 1604.2(a) (1985) ("The commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly."). The only appropriate application of the defense recognized by the regulations is "for the purpose of authenticity or genuineness . . . e.g., an actor or actress." *Id.* § 1604.2(n)(2). Because Congress charged the EEOC with the responsibility for enforcing Title VII and because the agency has interpreted Title VII consistently, EEOC's construction of the statute is entitled to great weight. See *Dothard v. Rawlinson*, 433 U.S. 321, 334 n.19 (1977); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); cf. *United States v. City of Chicago*, 400 U.S. 8, 10 (1970) (Court defers to definition of "train" given by the Interstate Commerce Commission, agency in charge of the area); *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (when construing a statute, courts should give "great deference to the interpretation given the statute by the officers or agency charged with its administration"); *Power Reactor Dev. Co. v. International Union of Elec., Radio & Mach. Workers*, 367 U.S. 396, 408 (1961) (Atomic Energy Commission's interpretation of its own regulation and governing statute should be respected).

122. An alternative reading of "reasonably necessary" could allow employers to discriminate in hiring to protect themselves from civil liability for infringing third party privacy rights. This approach, however, conflicts with precedent establishing that mere economic hardship to a business cannot provide a defense to discrimination. See *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716-17 (1978) (Title VII does not contain a cost justification defense); *Wilson v. Southwest Airlines*, 517 F. Supp. 292, 304 (N.D. Tex. 1981) ("potential loss of profits or possible loss of competitive advantage" not relevant to bfoq defense); cf. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 n.8 (4th Cir.) (as court pointed out in business necessity case, "[w]hile considerations of economy and efficiency will often be relevant to determining the existence of business necessity, dollar cost alone is not determinative"), *cert. dismissed*, 404 U.S. 1006 (1971); *Bush v. Lone Star Steel Co.*, 373 F. Supp. 526, 532-33 (E.D. Tex. 1974) (as court noted in connection with racial discrimination, the "expense involved in changing from a discriminatory system . . . would [not] justify the continuation of . . . discrimination").

123. The legislative history of the defense includes statements of individual congresspersons that suggest a broad interpretation of the bfoq defense. See, e.g., 110 Cong. Rec. 2718 (1964) ("There are so many instances where the matter of sex is a bona fide occupational qualification.") (remarks of Rep. Goodell). Several of these remarks dealt with applying the bfoq defense to positions in which employees, if hired on a nondiscriminatory basis, would be required to have intimate contact with members of the opposite sex. Thus, for example, Representative Goodell remarked, "I think of an elderly woman who wants a female nurse. There are many things of this nature which are bona fide occupational qualifications, and it seems to me they would be properly considered here as an exception." 110 Cong. Rec. 2718 (1964) (remarks of Rep. Goodell). Similarly, Representative Multer queried, "When we come to hire a masseur in the gymnasium of the House or the Senate, will we be justified in saying, when a woman applies for the job, that a 'masseuse' qualifies as a 'masseur'?" 110 Cong. Rec. 2720 (1964) (remarks of Rep. Multer).

Representative Green also spoke to the issue:

Let us taken another example: In a large hospital an elderly woman needs special round-the-clock nursing. Her family is seeking to find a fully qualified registered nurse. It does not make any difference to this family if the nurse is a white or a Negro or a Chinese or a Japanese if she is fully qualified. But it does

protect third party privacy interests. Part III of this Article will show that courts can encourage businesses to protect privacy, avoid liability and comply with legal obligations, without expanding the bfoq defense.

Courts should abandon the expanded bfoq defense. It is not required by the statute and it is unnecessary to protect third party privacy interests. Most importantly, this unnecessary expansion of the defense conflicts with the underlying principles of Title VII. When legislation clashes with constitutional rights, courts "often strain to construe [it] so

make a great deal of difference to this elderly woman and her family as to whether this qualified nurse is a man or a woman. Under the terms of the amendment adopted last Saturday the hospital could not advertise for a woman registered nurse because under the amendment by the gentleman from Virginia [Mr. Smith] this would be discrimination based on sex. The suggestion of the gentleman from New York [Mr. Goodell] helped a great deal, however.

110 Cong. Rec. 2720 (1964) (remarks of Rep. Green) (brackets in original).

Even if these remarks could be read to mean that one or more of these individual congresspersons believed that the bfoq defense was meant to protect third party privacy interests, these individual views should not be viewed as representative of the intent of Congress as a whole. Courts seeking to divine congressional intent ordinarily accord little weight to the views of individual congresspersons. *See, e.g., City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 714 (1978) ("We conclude that [the senator's] isolated comment on the Senate floor cannot change the effect of the plain language of the statute itself.").

The unusual legislative history of the sex discrimination provisions of Title VII deprives these statements of the little persuasive authority that they normally would have.

[T]he legislative history of the sex discrimination and BFOQ provisions of Title VII is sparse. Congress held no hearings on the subject, congressional rules limited debate, and many opponents of race discrimination legislation supported the sex amendment purely for reasons of legislative strategy. On the last day of House debate on the Civil Rights Bill, Representative Smith, a staunch opponent of the Bill, proposed, in jest, the inclusion of "sex" as a prohibited classification in an attempt to make the Bill unacceptable to as many legislators as possible. This strategy resulted in support of the sex amendment by opponents of sexual equality and opposition to it by many advocates of the Bill, who feared that Congress would not pass an overamended bill. . . . [T]he House . . . passed the sex amendment with the support of an unintended coalition of opponents of the Bill, who voted for the amendment with hopes of defeating the entire Bill, and many pro-Bill liberals, who favored giving women the protection of Title VII.

Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 Tex. L. Rev. 1025, 1027 (1977) (footnotes omitted). Because the supporters of the sex amendment had such conflicting motivations, it would be dangerous to assume that the statements of any individual congressperson represent congressional intent in passing the amendment. Mindful of this danger, courts have relied on the language of Title VII and its broad equal employment mandate to find that sex is not a bfoq for positions requiring heavy lifting despite statements by individual congresspersons to the contrary. *Compare Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1224-25 (9th Cir. 1971) and *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 234-35 (5th Cir. 1969) with 110 Cong. Rec. 7217 (statement of Sen. Clark) (prepared response leaving open the possibility that Title VII might not require equal job opportunities in situations in which heavy lifting is required). Similarly, in resolving the conflict between equal employment and privacy, the statements of individual congresspersons should be ignored in favor of the plain language and underlying principles of the statute supporting a narrow interpretation of the bfoq defense.

as to save it against constitutional attack."¹²⁴ But even when conflicting constitutional rights are at stake courts must interpret the statute in a manner that preserves its sense and purpose.¹²⁵ The prevailing interpretation of the bfoq defense accommodates constitutional and common law privacy rights at the expense of Title VII's central purpose. Title VII requires equal employment opportunity for similarly situated individuals.¹²⁶ Title VII also requires employers to allocate employment opportunities on the basis of individual qualifications, not on the basis of assumptions, stereotypes, community standards or customer preferences regarding appropriate male and female jobs.¹²⁷ These principles are so basic to Title VII's meaning and purpose that to interpret the bfoq defense to permit disparate treatment of similarly situated individuals to accommodate privacy interests defined by community standards and customer preferences rewrites the statute.¹²⁸ The application of the bfoq/privacy defense in *Backus v. Baptist Medical Center*¹²⁹ clearly illustrates these flaws in the expanded defense.

In *Backus*, a male nurse applied to work in the labor and delivery section of the hospital's obstetrics and gynecology department. The hospital refused his request on the ground that "the hospital 'did not employ male R.N.'s in the OB-GYN positions because of the concern of our female patients for privacy and personal dignity which make it impossible for a male employee to perform the duties of this position effectively.'"¹³⁰ Applying the approach outlined above, the court held that employing male nurses in the labor and delivery area would unavoidably infringe on valid privacy interests of the hospital's female patients. Testimony at the trial revealed that many of the obstetrical patients would object to a male nurse.¹³¹ The court also relied on a number of other sources including cases taking judicial notice of a right to freedom from intimate contact by members of the opposite sex, cases recognizing a con-

124. *Scales v. United States*, 367 U.S. 203, 211 (1961); see *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 (1981); *United States v. Clark*, 445 U.S. 23, 27 (1980); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961); *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

125. See *Scales v. United States*, 367 U.S. 203, 211 (1961); *Cameron v. Mullen*, 387 F.2d 193, 203 (D.C. Cir. 1967).

126. See *infra* notes 138-39 and accompanying text.

127. Although the privacy cases interpret Title VII differently, the overwhelming weight of authority has rejected customer preference and community standards as a basis for allocating jobs between males and females. See *infra* notes 150-58 and accompanying text.

128. During floor debates Senator Case argued that the McClellan amendment, which would have permitted discrimination to preserve good will, would nullify Title VII. See 110 Cong. Rec. 13825 (1964) (remarks of Sen. Case). Similarly, interpreting the bfoq defense provision to permit discrimination based on customer preference would nullify the sex discrimination provisions of Title VII.

129. 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982).

130. *Id.* at 1192 (quotation in original).

131. *Id.* at 1196.

stitutional right to privacy and a book referring to "the accepted mores and personal sensitivities of the American people."¹³² The court concluded that "requiring labor and delivery nurses to be female is a bona fide occupational qualification . . . which is 'reasonably necessary to the normal operation of [a] particular business or enterprise.'"¹³³ Thus, the court found that discrimination against male as compared with female obstetric nurses was justified by the privacy interests of the female patients in obstetrics.

Between the lines of the opinion, however, lurks another form of discrimination that the court neither examined nor justified—discrimination against male obstetrics nurses as compared with female nurses providing intimate services to male patients in other departments. The book quoted by the court notes that, "[t]he hospital attendant not only has to replace and remove bedpans, but, if the patient is weak enough, may also have to bathe the genital regions."¹³⁴ Because over ninety-five percent of all nurses in this country are female,¹³⁵ it seems likely that somewhere at Baptist Medical Center female nurses were providing services requiring intimate contact with male patients.¹³⁶ In fact, although the opinion never discusses the duties of female nurses outside the maternity ward, female nurses at Baptist do provide intimate care to male patients. The hospital does not bar female nurses from positions requiring that they provide intimate care to male patients. Female nurses bathe male patients, help them use the toilet, administer shots and give them enemas. As a matter of practice rather than policy, male orderlies and male nurses insert catheters in male patients and shave their genital hair in preparation for surgery. But female nurses are not prohibited altogether from treating male patients who require intimate care.¹³⁷

Title VII prohibits employers from discriminating on the basis of protected class membership.¹³⁸ The courts universally interpret this mandate to mean that employers must treat similarly situated individuals equally, absent an applicable statutory or judicial exception.¹³⁹ The *Backus* court, applying the standard bfoq/privacy analysis, examined

132. *Id.* at 1193-95 (quoting A. Larson, *Employment Discrimination—Sex* § 14.30, at 4-7 to -8 (3d ed. 1980) (emphasis omitted)).

133. *Id.* at 1195-96.

134. *Id.* at 1194-95 (quoting A. Larson, *Employment Discrimination—Sex* § 14.30, at 4-7 to -8 (3d ed. 1980)).

135. See *supra* note 27.

136. The court acknowledged that the obstetrics patients were treated by male doctors, but distinguished doctors from nurses as follows: "plaintiff . . . is an *unselected individual* who is intruding on the obstetrical patient's right to privacy. The male nurse's situation is not analogous to that of the male doctor *who has been selected by the patient.*" 510 F. Supp. at 1195 (emphasis in original).

137. Telephone interview with Charlotte Mitchell, Director of Medical Nursing, Baptist Medical Center (July, 1984).

138. See 42 U.S.C. § 2000e-2(a) (1982).

139. See, e.g., *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1083-84 (1983) (per curiam); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973); *McDonald v. Santa Fe Trail Transp. Co.*,

Baptist Medical Center's treatment of Backus in comparison with its treatment of a similarly situated group—female nurses working in the obstetrics department. The standard analysis, however, ignores another relevant comparison—was the hospital unlawfully discriminating against Backus by barring him from duties requiring intimate contact with female patients while at the same time permitting female nurses to work in positions requiring intimate contact with male patients? Other courts that have applied the standard bfoq analysis to resolve conflicts with third party privacy interests have made the same mistake.¹⁴⁰

This issue, which lurks beneath the surface of *Backus* and other cases, is explicitly addressed in *Fesel v. Masonic Home, Inc.*¹⁴¹ In *Fesel*, a nursing home refused to hire male nurse's aides. At the home, nurse's aides dressed and bathed patients, changed bedpans, inserted catheters and helped patients use toilets.¹⁴² Twenty-two of the home's residents were female and eight were male.¹⁴³ All of the home's nurse's aides were female.¹⁴⁴ The home asserted that hiring male nurse's aides would violate legitimate privacy interests of its female patients. In support of its position, the employer presented testimony and affidavits of ten of the female patients that they would object to personal care by a male nurse's aide and would leave the home if forced to submit to such care. Relatives of several female patients, the home's Director of Nursing Services and the home's treating and substitute physicians all testified that female patients would object to male nurse's aides attending to their personal needs.¹⁴⁵ Based on this evidence, the court found that hiring "male nurse's aides would directly undermine the essence of its business operation."¹⁴⁶ The court reasoned that because privacy interests are protected by criminal

427 U.S. 273, 283 (1976) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)).

140. Like *Backus*, *EEOC v. Mercy Health Center*, 29 Fair Empl. Prac. Cas. (BNA) 159, 162-63 (W.D. Okla. 1982), banned males from obstetrics without discussing similarly situated female nurses. In prison cases courts have held that sex can be a bfoq defense for contact duties without comparing treatment of male guards at female correctional institutions in the same jurisdiction. Thus, in *Reynolds v. Wise*, 375 F. Supp. 145 (N.D. Tex. 1974), the court held that "[s]elective work responsibilities among correctional officers [at the Federal Correctional Institution at Seagoville, Texas] excluding from the duties of women assignment to dormitories or shake-downs . . . does not discriminate against women." *Id.* at 151. The court failed to consider whether the Bureau of Prisons discriminated against women by restricting their employment while permitting male guards to work in women's prison dormitories. At the time of the lawsuit, male guards at the Federal Correctional Institute at Fort Worth patrolled female dormitories and performed all other correctional duties except non-emergency strip searches of female prisoners. Telephone Interview with Charlotte Barron, Executive Assistant to the Warden, Federal Correctional Institute at Fort Worth (August 1, 1984) (policy in effect since prison opened in 1971).

141. 447 F. Supp. 1346 (D. Del. 1978), *aff'd mem.*, 591 F.2d 1334 (3d Cir. 1979).

142. *Id.* at 1348.

143. *Id.*

144. *Id.*

145. *Id.* at 1352.

146. *Id.* at 1354.

and tort law, the home could not force female guests to accept intimate care from male aides.¹⁴⁷ With respect to male patients receiving intimate personal care from female aides, the court stated: "The question of the preferences of the male guests at the Home was not explored at trial. However, since the male guests do presently accept care from female nurse's aides, there does not appear to be any problem of nonconsenting male guests."¹⁴⁸

Thus, applying the standard bfoq/privacy analysis, the *Fesel* court's holding permits employers to exclude males from jobs requiring intimate contact with female patients while at the same time allowing them to hire females for positions requiring intimate contact with male patients. The only stated justification for permitting this discrimination is privacy as defined by patient preference—males do not object to treatment by female nurses, but females do object to treatment by male nurses. Implicit is the additional justification that privacy interests as defined by community standards permit female nurses to treat male patients but not the reverse.¹⁴⁹ Thus, even if courts compare similarly situated individuals, i.e., male employees treating female patients and female employees treating male patients—the bfoq/privacy analysis permits employers to distinguish between them because customer preference and community standards dictate that they should.

The result reached in *Fesel* is inevitable if one accepts third party privacy interests as a legitimate basis for the bfoq defense. As discussed previously, bodily privacy rights, whether constitutional or common law, are defined by history, community standards and the preferences of the individuals who are subjected to bodily intrusions. If the bfoq defense encompasses third party privacy interests then it, too, will reflect history, community standards and customer preferences and will permit intentional discrimination between similarly situated individuals if history, community standards and customer preferences dictate different treatment.

147. *Id.* at 1353.

148. *Id.* at 1353 n.5. Although the court noted that male doctors worked at the home, *see id.* at 1352, it made no effort to distinguish between intimate contact by male doctors and male aides. Presumably, if the court had reached this issue, it would have distinguished between the two on the ground that the female patients consented to care by male doctors, but not by male aides.

149. The court acknowledged that "the attitudes of the nonconsenting female guests at the Home are undoubtedly attributable to their upbringing and to sexual stereotyping of the past." *Id.* at 1352. Another possible justification that may be hiding between the lines in these cases is the notion that males are more likely to molest females than vice versa. Even if statistics support this notion, the Supreme Court has clearly held that group characteristics cannot support discrimination against individual members of a protected group. *See City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978); *cf. Connecticut v. Teal*, 457 U.S. 440, 453-56 (1982) (even if employer might have reached a nondiscriminatory "bottom line," discrimination against individual members of protected group is still a violation of Title VII). Employers must measure the qualifications of each individual.

But Title VII,¹⁵⁰ EEOC Guidelines implementing Title VII¹⁵¹ and other decisions interpreting Title VII¹⁵² prohibit reliance on community

150. The only statutory defense to intentional discrimination is the bfoq defense. See 42 U.S.C. § 2000e-2(e) (1982). Congress refused to permit employers to discriminate to improve customer relations or good will. The Senate rejected an amendment that would have permitted employers to discriminate if discrimination would be "beneficial to the normal operation of the particular business or enterprise involved or to the good will thereof" or if nondiscriminatory hiring "would not be in the best interests of the particular business or enterprise involved, or for the good will thereof." See 110 Cong. Rec. 13,825 (1964) (amendment presented by Sen. McClellan). Given Title VII's legislative history, riddled with conflicting individual motivations, we should ascribe great weight to this indication of collective legislative intent to prohibit employers from relying on company good will or customer preferences to excuse discrimination.

151. The EEOC's Guidelines provide:

(a) The commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Label [sic]—'Men's jobs' and 'Women's jobs'—tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualifications exception:

(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preference of coworkers, the employer, clients or customers

29 C.F.R. § 1604.2(a)(1) (1985). Thus, the EEOC has interpreted Title VII to forbid discrimination based on "assumptions of the comparative employment characteristics of women," "stereotyped characterizations of the sexes," "preference of coworkers, the employer, clients or customers" and labels designating jobs as "'Men's jobs' and 'Women's jobs.'" EEOC has consistently maintained this interpretation which is, therefore, entitled to great weight. See *supra* note 121.

152. See, e.g., *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978) ("It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' . . . characteristics of males or females."); *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) ("it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes"); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (per curiam) (Marshall, J., concurring) ("By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing 'to hire an individual based on stereotyped characterizations of the sexes.'") (footnote omitted) (quoting EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.1(a)(1)(ii) (1971) (current version at 29 C.F.R. § 1604.2(a)(1)(ii) (1985))); *Gerdorn v. Continental Airlines*, 692 F.2d 602, 609 (9th Cir. 1982) (en banc) (consumer preference cannot justify airline's policy of applying weight limit to females but not to males), *cert. dismissed*, 460 U.S. 1074 (1983); *Sprogis v. United Air Lines*, 444 F.2d 1194, 1199 (7th Cir.) (passenger preference for unmarried stewardesses does not justify discrimination against married women), *cert. denied*, 404 U.S. 991 (1971); *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 389 (5th Cir.) ("[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome."), *cert. denied*,

standards and customer preferences to justify intentional discrimination against a protected class. And they do so with good reason. By enacting Title VII Congress intended to remove artificial barriers that "operate to 'freeze' the status quo of prior discriminatory employment practices."¹⁵³ If the bfoq defense permits employers to hire employees on the basis of the community's assumptions, stereotypes and preferences, the exception swallows the rule¹⁵⁴ because even widely shared social norms frequently are motivated by discriminatory animus or are the products of past discrimination. When Title VII was enacted, widely held social norms and stereotypes prevented women from working if they had small children at home,¹⁵⁵ prohibited women from lifting heavy weights or working late hours,¹⁵⁶ prevented women from tending bar¹⁵⁷ and banned pregnant

404 U.S. 950 (1971); *Woody v. City of West Miami*, 477 F. Supp. 1073, 1079 (S.D. Fla. 1979) (Title VII prohibits employer action based on stereotyped concepts of ability to perform certain tasks because of sex); *United States v. City of Buffalo*, 457 F. Supp. 612, 629 (W.D.N.Y. 1978) (by enacting Title VII, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes"), *aff'd and modified per curiam on other grounds*, 633 F.2d 643 (2d Cir. 1980).

Both the EEOC and the lower courts have relied on social norms to justify *some* forms of discrimination. Courts have held that employers may require their employees to conform to community standards of grooming even if those standards differ for males and females. *See, e.g., Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084, 1087, 1092 (5th Cir. 1975). Similarly, the EEOC's Sex Discrimination Guidelines permit separate restroom facilities for male and female employees. *See* 29 C.F.R. § 1604.2(b)(5) (1985). Whether these conclusions are correct is beyond the scope of this Article. They are, however, sufficiently distinguishable from the privacy cases that they provide little or no support for expanding the bfoq defense to accommodate third party privacy interests. Unlike social norms regarding third party privacy interests, neither separate grooming standards nor separate restrooms deny employment opportunities to either sex or channel males and females into segregated jobs.

153. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

154. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (*per curiam*) (Marshall, J., concurring) (It is improper to assume "that the Act permits ancient canards about the proper role of women to be a basis for discrimination. Congress . . . sought just the opposite result. . . . The exception for a 'bona fide occupational qualification' was not intended to swallow the rule."); 110 Cong. Rec. 13,825 (1964) (remarks of Sen. Case) (in response to Sen. McClellan's proposed amendment noting that an amendment permitting intentional discrimination to benefit the good will of a business "would destroy the bill").

155. *See, e.g., Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543 (1971) (*per curiam*) (employer announced that it would not hire women with preschool-age children). Although the Court declined to accept the employer's view that women with small children should not hold jobs, Chief Justice Burger, the author of the Court's *per curiam* opinion, prior to conference in the case reputedly stated that he strongly agreed with the employer: "'I will never hire a woman clerk,' Burger told his clerks. 'A woman would have to leave work at 6 P.M. to go home and cook dinner for her husband.'" B. Woodward & S. Armstrong, *The Brethren* 123 (1979).

156. *See, e.g., Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1223 (9th Cir. 1971) (plaintiff challenged company policy prohibiting women from holding jobs requiring heavy lifting and long hours); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 232-33 (5th Cir. 1969) (company used Georgia law, prohibiting women from lifting heavy weights, as basis for its bfoq defense). When Title VII was passed, many states had protective statutes prohibiting or limiting female employment in positions requiring heavy lifting or long hours. *See* 29 C.F.R. § 1604.2(b) (1985).

teachers from the classroom.¹⁵⁸ By explicitly recognizing the relevance of social norms regarding privacy, the expanded bfoq defense invites courts to reinstate unfounded stereotypical notions of appropriate male and female jobs as a legitimate basis for hiring decisions. In fact, one article has already suggested that the privacy cases provide a basis for generally expanding the scope of the bfoq defense to accommodate "broadly shared social norm[s]."¹⁵⁹

Privacy interests are extremely compelling. Even the most ardent equal employment advocate is likely to be unnerved by images of male guards conducting routine body cavity searches of female prisoners. This deep-seated emotional response may well explain why the lower courts are nearly unanimous in recognizing the bfoq/privacy defense. But expanding the bfoq defense to accommodate social norms regarding privacy exemplifies all that is wrong with relying on social norms to justify intentional discrimination. Even where inherent biological differences between the sexes are at issue, the lines society draws do not necessarily reflect those differences.¹⁶⁰ Rather, the lines drawn by social norms take a jagged route—sometimes forbidding intimate contact between the sexes, sometimes not. For the past century, nurses have been predominantly female¹⁶¹ and doctors predominantly male.¹⁶² Historically, female nurses and male doctors have treated patients of both sexes. Community standards regarding intimate viewing or touching of one sex by the other reflect this historical fact—female nurses may treat male patients and male doctors may treat female patients,¹⁶³ but male nurses

157. See *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 8-10, 485 P.2d 529, 533-34, 95 Cal. Rptr. 329, 333-34 (1971) (invalidating state statutes prohibiting females from tending bar).

158. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 634-35 (1974) (plaintiff challenged local school board mandatory maternity leave policy compelling pregnant women to take leave without pay several months before childbirth).

159. Freed & Polsby, *supra* note 94, at 589. Professors Freed and Polsby propose a formulation recognizing "that although explicit sex classifications are presumptively invalid, they can be justified . . . where there is a broadly shared social norm that requires that men and women be treated differently." *Id.*

160. If they did, the legitimacy of conflicting privacy interests would be more defensible and the negative impact on equal employment would be reduced considerably.

161. Until the late nineteenth century, nursing was strictly a male occupation. It was opened up to females "largely as a result of Florence Nightingale and her work during the Crimean War. Men let Florence do her thing, thus turning over to women hospital dirty work to make it women's work." Etzkowitz, *The Male Sister: Sexual Separation of Labor in Society*, 33 J. Marriage & Fam. 431, 432 (1971).

162. In "1914, women constituted only 4.0% of all medical students. . . . In 1964-65 . . . women still constituted only 7.7% of medical students." Cuca, *The Specialization and Career Preferences of Women and Men Recently Graduated from U.S. Medical Schools*, 34 J. Am. Med. Women's Ass'n 425, 425 (1979) (footnote omitted).

163. [N]ursing as a feminine role has . . . acquired an historical weight. The role of nurse has been accepted as being especially congruent with the traditional role of the female in western culture. In the United States the nurse is referred to as 'she'; indeed in England a nurse is referred to as 'sister,' be the individual male or female.

Etzkowitz, *supra* note 161, at 432.

may not treat female patients. The preferences of individual patients regarding their health care providers also reflect historical fact and community standards. Male patients do not complain when they are treated by female nurses.¹⁶⁴ Female patients accept treatment by male doctors¹⁶⁵ and, when asked, even express a preference for male doctors.¹⁶⁶ Job stereotyping is so strong that some male patients complain about male nurses and some female patients complain about female doctors on the ground that they fear homosexual contact.¹⁶⁷ Job stereotyped preferences are prevalent in other occupations as well. Female guards may not view naked male prisoners, but male customers prefer masseuses to masseurs.¹⁶⁸

In short, social norms often reflect stereotyped notions of appropriate male and female roles¹⁶⁹ and privacy interests are asserted when women or men try to break into occupations traditionally held by the opposite sex. One could conclude, therefore, that the asserted privacy interests are not legitimate; that they are a pretext for discrimination; or that they are so inconsequential that they are outweighed by equal employment goals.¹⁷⁰ But even if the asserted privacy interests are entitled to constitutional or common law protection,¹⁷¹ they should not dictate employment practices because they are both the product and the source of discriminatory job segregation.¹⁷² They represent deeply held biases re-

164. See *supra* notes 133-41, 144-50 and accompanying text.

165. See *Backus v. Baptist Medical Center*, 510 F. Supp. 1191, 1195 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982).

166. See Adams, *Patient Discrimination Against Women Physicians*, 32 J. Am. Med. Women's Ass'n 255, 256-57 (1977) (studies showed that patients discriminate against female physicians); Engleman, *Attitudes Toward Women Physicians*, 120 W. J. Med. 95, 96 (1974) (study showed that 78% of patients of both sexes prefer a male doctor). But see Berg, *supra* note 98, at 1108 (concluding that female and male doctors are equally accepted by vasectomy patients); Haar, Halitsky & Stricker, *Factors Related to the Preference for a Female Gynecologist*, 13 Med. Care 782, 784 (1975) (study showed 34% preferred female gynecologist; 19.3% did not).

167. See Brookfield, *Some Thoughts on Being a Male in Nursing*, in *Socialization, Sexism, and Stereotyping: Women's Issues in Nursing* 273 (J. Muff ed. 1982) (male nurse noting that younger adult males prefer female nurses); Mehren, *Gynecology: Doctor, Too, Is a Woman*, L.A. Times, May 11, 1983, at 19, col. 2 (some women will not permit a female doctor to examine them, perhaps because of a fear of lesbianism).

168. See *Stratton v. Drumm*, 445 F. Supp. 1305, 1311 (D. Conn. 1978).

169. Nursing, for example, has been one of the most stereotyped occupations "because of its congruence with the traditional female role." Fottler, *Attitudes of Female Nurses Toward the Male Nurse: A Study of Occupational Segregation*, 17 J. Health & Soc. Behavior 98, 99 (1976).

170. See *supra* Part I. If privacy interests are a pretext for discrimination they cannot form the basis for a bfoq defense whether or not the defense is defined to accommodate privacy.

171. Privacy rights by definition reflect social norms that change with the times. See *supra* Part I.

172. The Supreme Court has recognized that reliance on stereotypes contradicts the basic policy of the statute because even "true" stereotypes may result from past employment discrimination rather than any innate differences between the sexes. See *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 710 n.17 (1978).

garding the appropriate roles of men and women. Men are doctors, supervisors, managers and leaders. Women are nurses, nurturers and assistants. By recognizing these interests as justification for intentional discrimination, courts undermine Title VII by legitimizing sexual stereotypes and perpetuating the status quo—segregated jobs.

In conclusion, by succumbing to the temptation to expand the bfoq defense to protect third party privacy interests, courts have erred in two ways. First, they have failed to examine the validity of the asserted privacy interests. Second, by permitting privacy interests to justify intentional discrimination, courts have contravened the central purpose of Title VII—guaranteeing individuals equal employment opportunity based on their ability to perform a job rather than on assumptions, stereotypes and community preferences regarding appropriate jobs for men and women. This reading of the statute is unnecessary because neither the statute nor its legislative history requires it. Courts can harmonize Title VII with the right to privacy. They can preserve legitimate privacy rights without creating potentially dangerous exceptions to the prohibition against intentional discrimination. They can accommodate legitimate privacy interests and at the same time protect employees against intentional discrimination.

III. THE SOLUTION

Courts should resolve the conflict between equal employment rights and privacy rights by applying traditional Title VII analysis. This analysis, applied without the expanded bfoq/privacy defense, enhances both privacy and equal employment, rather than promoting one interest at the expense of the other. Employers who segregate jobs by sex to protect third party privacy interests are guilty of intentional sex discrimination. The only defense to intentional discrimination is the statutory bfoq defense. Unless the traditional bfoq defense is expanded to encompass privacy interests, sex is not a bfoq for these positions because both sexes are capable of nursing, guarding, fitting clothes, searching prisoners and cleaning bathrooms.¹⁷³

Courts should rule that intentional sex discrimination cannot be justified by third party privacy interests.¹⁷⁴ This ruling would require employers to treat similarly situated employees equally. Title VII does not prohibit employment restrictions. It only prohibits those that discriminate on the basis of sex. If hospitals wish to protect the privacy interests

173. See *supra* notes 116-23 and accompanying text.

174. A few courts and the EEOC have already held that the traditional bfoq defense should not encompass privacy interests. See *Griffin v. Michigan Dep't of Corrections*, 30 Fair Empl. Prac. Cas. (BNA) 638, 648 (E.D. Mich. 1982); EEOC Decision No. 71-2410, 4 Fair Empl. Prac. Cas. (BNA) 17, 18 (1971); *cf. Forts v. Ward*, 471 F. Supp. 1095, 1099 (S.D.N.Y. 1978) (while traditional bfoq defense should not encompass privacy interests, privacy interests should be balanced against equal employment rights), *vacated in part on other grounds*, 621 F.2d 1210 (2d Cir. 1980).

of their obstetrics patients, they may do so by means of sex-neutral rules designed to accommodate privacy interests while imposing the least possible impact on equal employment. A hospital could prohibit all nurses from providing intimate care to patients of the opposite sex, or it could require that all nurses providing such care be accompanied by another health provider who is the same sex as the patient. Or it could assign nurses to patients without any sex restriction but permit individual patients of either sex to request a provider of the same sex. In short, if the hospital wishes to protect the privacy interests of one class of patients, it must provide the same level of protection to all patients to ensure equal employment opportunity.¹⁷⁵ If the hospital wishes to restrict the employment opportunities of one sex in the interest of promoting third party privacy interests, it must place the same restrictions on employees of the other sex. Such employment restrictions, phrased and applied in a neutral fashion, are feasible¹⁷⁶ and would comply with Title VII.

None of the rules I am proposing is purely sex-neutral. These same rules would be characterized as impermissible facially discriminatory rules if the classifications they drew were racial rather than sexual. With the exception of the bfoq defense, Title VII prohibits sex and race discrimination equally. Why then are they "neutral" even though they classify employees by sex?

A prohibited sex or race biased rule is one that uses sex or race as a proxy for something else. Thus, an employer who wants his employees to be strong may not use "male" as a proxy for strength. He must instead develop a neutral criterion such as "able to lift 35 pounds." A neutral rule is one drafted in terms of the goal to be achieved rather than in terms of sex or race as a proxy for the employer's goal. When the goal is strong employees, sex need not be mentioned at all in the neutral rule. A rule designed to promote patient privacy, however, must refer to sex because the privacy interests it is designed to protect are themselves defined in terms of the sex of the provider and of the patient.¹⁷⁷ The same rule is impermissible if it draws a racial distinction because there is no legally recognized right to be free of intimate contact by a health care provider of another race. Absent such a right,¹⁷⁸ employers have no

175. This approach grants protection from opposite sex contact to patients who, because they would consent, have no legal right to protection. They are protected, not because they have a right to be protected, but because the employees have a right to equal employment opportunities. Courts have taken the same approach when faced with conflicts between Title VII and state statutes granting special rights to female employees. Thus, in *Hays v. Potlatch Forests, Inc.*, 465 F.2d 1081 (8th Cir. 1972), the court noted that a state statute granting overtime rights to females was not a defense to discrimination because the employer could comply with Title VII and the protective statute by granting the same overtime rights to men. *Id.* at 1082-83.

176. See *infra* text following note 219.

177. See *supra* Part I.

178. Even express racial classification can be neutral. In *Kromnick v. School Dist.*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985), teachers challenged a transfer rule designed to maintain a racially balanced teaching staff. *Id.* at 898-99. The

need, in fact no right, to establish racial classifications to protect that right, even when the restrictions apply to all races equally.¹⁷⁹

As a practical matter, by requiring employers to promulgate neutral rules tailored to protect legitimate privacy interests, courts would facilitate the breakdown of traditionally segregated job categories. For example, hospitals might comply by admitting males to nursing positions without restriction, or by applying restrictions to female and male nurses that would enhance the employment of male nurses. Similarly, police forces could comply either by hiring female officers without restricting their contact with male arrestees, or by restricting both male and female contact with opposite sex arrestees, thereby enhancing the employment prospects of female officers. In time, the presence of males and females in nontraditional positions could alter the privacy attitudes of prisoners, customers and patients, thus further undermining the need for restricting or segregating jobs to protect privacy interests.

Even neutral rules, however, can contravene Title VII. A neutral employment restriction that has a negative impact on a protected class violates Title VII just as effectively as outright intentional discrimination.¹⁸⁰ In most instances, neutral rules such as those which I have proposed would apply equally to employees of both sexes. Both males and females occupy hospital beds and require intimate care. A neutral rule restricting opposite sex contact or requiring a chaperone would affect the employment of nurses and doctors of both sexes.¹⁸¹ But in prisons and massage parlors and on police forces, a rule prohibiting opposite sex contact would seriously reduce the employment opportunities of female guards, police officers and masseuses because most prisoners,¹⁸² arrestees¹⁸³ and massage parlor customers¹⁸⁴ are male. Also, in hospitals a neutral rule permitting patients to select the sex of their health care provider could reduce the employment opportunities of male nurses and female doctors. Even a neutral hospital rule prohibiting intimate contact with patients of the opposite sex could adversely affect female employment if the hospital implemented the policy by firing female nurses and

court referred to the rule as racially neutral because it required the transfer of both black and white teachers. *Id.* at 903.

179. In addition, the impact of such a rule would be so obviously detrimental to minority racial groups that discriminatory intent could be presumed.

180. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971). Rules that have an obvious and extreme disparate impact may be a pretext for intentional discrimination. *Cf. Personnel Administrator v. Feeney*, 442 U.S. 256, 279 n.25 (1979) (case decided under the equal protection clause noting that when "adverse consequences of a law upon an identifiable group are . . . inevitable . . . a strong inference that the adverse effects were desired can reasonably be drawn").

181. Male employment would be reduced somewhat more than female employment because females use "almost all types of health-care services" more than males. Lewis & Lewis, *supra* note 27, at 866.

182. See *J. Minority Employment*, March, 1984, at 2, col. 3 (according to Justice Department, only one prisoner in 25 is a woman).

183. See *supra* note 24.

184. See *Stratton v. Drumm*, 445 F. Supp. 1305, 1311 (D. Conn. 1978).

replacing them with less qualified male nurses. This disparate impact violates Title VII unless the employer can establish a business necessity for the challenged rule.

Business necessity is a judicially created defense to charges of disparate impact discrimination. An employment restriction that is "related to job performance"¹⁸⁵ is a business necessity and may be applied even if it excludes protected class members in disproportionate numbers.¹⁸⁶ In this respect, the business necessity defense resembles the statutory bfoq defense to intentional discrimination—both insulate job related employment criteria from attack under Title VII. Thus, the bfoq defense permits employers to use sex itself as an employment criterion if sex is job related while business necessity permits employers to use other job related criteria even though they disproportionately screen out one sex or the other. Because third party privacy interests do not relate to job performance, they cannot form the basis either for a bfoq defense or for a job relatedness/business necessity defense.

The business necessity defense, however, is broader than the statutory bfoq defense. Although the bfoq defense is inapplicable in race discrimination cases,¹⁸⁷ business necessity can justify neutral rules that have a disparate impact on a protected racial group. The business necessity defense also recognizes more justifications for discrimination than the bfoq defense. But the scope of the defense is unclear. Although the Supreme Court has implied that the defense permits some employment practices that cannot be justified by job relatedness,¹⁸⁸ the Court never has clearly defined the limits of the defense.¹⁸⁹ Both the lower courts¹⁹⁰ and com-

185. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

186. *Id.* at 430-31.

187. The bfoq defense is only available as a defense to religious, sexual or national origin discrimination. See 42 U.S.C. § 2000e-2(e) (1982).

188. See *Nashville Gas Co. v. Satty*, 434 U.S. 136, 143 (1977) (dictum) (referring to policy denying accumulated seniority to female employees returning from maternity leave, the Court stated that "[i]f a company's business necessitates the adoption of particular . . . policies, Title VII does not prohibit the company from applying these policies"), *superseded on other grounds by* Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)); see also *Zuniga v. Kleberg County Hosp., Kingsville, Tex.*, 692 F.2d 986, 991 (5th Cir. 1982) (Court has only "implied that 'business necessity' need not be synonymous with 'job-relatedness'"). More recently, in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), a Title VI case challenging last-hired first-fired layoffs, the Court cited *Griggs* for the proposition that "[i]f the [employer] can bear the burden of proving *some* 'business necessity' for practices that have discriminatory impact, it has a complete affirmative defense to claims of violation." *Id.* at 598 (emphasis added) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)). Although the Court's general definitions of business necessity have often mentioned a job related requirement, see, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 331-32 (1977), the Court has never clearly limited the defense to job relatedness.

189. See C. Sullivan, M. Zimmer & R. Richards, *Federal Statutory Law of Employment Discrimination* 53 (1980); Williams, *supra* note 118, at 689-90. The Court has defined the defense in a variety of general terms. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 332 n.14 (1977) ("a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge"); *Griggs v.*

mentators¹⁹¹ have defined the defense in terms that encompass more than job relatedness, but these formulations are too general to provide much guidance for applying the defense to particular factual circumstances. For that purpose the most useful discussions of the defense occur in the context of challenges to employment practices that are identical or similar to the challenged practices discussed in this Article.¹⁹²

For example, neutral rules designed to protect employees' unborn offspring from exposure to hazardous work conditions, are a good source of guidance for applying the business necessity analysis to employment restrictions designed to protect third party privacy interests.¹⁹³ Fetal protection rules raise many of the same issues as rules designed to enhance privacy. Like privacy rules, fetal protection rules are designed to protect third party interests (unborn children) rather than improve job performance. Employers promulgate both privacy rules and fetal protection rules for similar reasons—concern for the health or privacy rights of third parties and fear of liability to injured third parties. In both cases, facially neutral rules are likely to have more impact on the employment opportunities of one sex than the other.

Duke Power Co., 401 U.S. 424, 432 (1971) ("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.").

190. See, e.g., *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1262 (6th Cir. 1981) (A proper test looks to whether discriminatory employment practice is "necessary to safe and efficient job performance. For a practice to be 'necessary' however, it need not be the *sine qua non* of job performance; indispensability is not the touchstone. Rather, the practice must substantially promote the proficient operation of the business.") (citation omitted) (emphasis in original); *Williams v. Colorado Springs, Colo. School Dist. No. 11*, 641 F.2d 835, 842 (10th Cir. 1981) ("The practice must be essential, the purpose compelling."); *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 705 n.6 (8th Cir. 1980) ("the proper standard . . . is not whether it is justified by routine business considerations but whether there is a *compelling need* for the employer to maintain that practice") (emphasis in original); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 451 (5th Cir. 1971) ("Necessity connotes an irresistible demand.") (quoting *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971)), *cert. denied*, 406 U.S. 906 (1972); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.) ("The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."), *cert. dismissed*, 404 U.S. 1006 (1971). But see *Johnson v. Pike Corp. of Am.*, 332 F. Supp. 490, 495 (C.D. Cal. 1971) ("The sole permissible reason for discriminating against actual or prospective employees involves the individual's capability to perform the job effectively. This approach leaves no room for arguments regarding inconvenience, annoyance or even expense to the employer.").

191. See, e.g., B. Schlei & P. Grossman, *Employment Discrimination Law* 1329 (1983) ("In our view, 'job relatedness' is merely one means of proving 'business necessity,' although it may in some circumstances be the only means if the purpose of the selection device or other criterion is to predict the capacity of particular individuals to perform the job successfully. If the purpose of the practice is not to predict successful job performance, business necessity will turn on the burden or benefit to the business.") (footnotes omitted).

192. See B. Schlei & P. Grossman, *supra* note 191, at 1329-30.

193. None of the cases located by the author that have rejected the bfoq analysis have reached the question of whether privacy concerns can form the basis of a business necessity defense.

Although the Supreme Court has not yet resolved the conflict between the rights of women to equal employment and the rights of their offspring to a healthy environment, recent opinions by the Fourth, Fifth and Eleventh Circuits have considered the application of the business necessity defense to employment practices designed to protect fetal health. All three circuits have concluded that, as a general matter, fetal protection programs are necessary to the safe and efficient operation of businesses even though they are not job related. The Fourth¹⁹⁴ and Eleventh¹⁹⁵ Circuits reasoned that as a matter of public policy, fetal protection is a legitimate business concern. The Fifth Circuit suggested that it would allow the defense to permit employers to protect themselves from potential tort liability,¹⁹⁶ while the other two circuits questioned the le-

194. In *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982), the Fourth Circuit concluded that "under appropriate circumstances an employer may, as a matter of business necessity, impose otherwise impermissible restrictions on employment opportunity that are reasonably required to protect the health of unborn children of women workers against hazards of the workplace." *Id.* at 1189-90 (footnote omitted). The court reached this conclusion by applying its own frequently cited business necessity standard from *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). That test asks "whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business." *Olin*, 697 F.2d at 1188 (emphasis deleted) (quoting *Robinson v. Lorillard Corp.*, 444 F.2d at 798). The court also quoted the Supreme Court's language in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), indicating that business necessity encompasses "'safe and efficient job performance.'" *Olin*, 697 F.2d at 1188 (emphasis deleted) (quoting *Dothard*, 433 U.S. at 332 n.14). Although the court acknowledged that the safety of unborn children is not an essential "aspect of the efficient operation of [a] business," *id.* at 1189, the court reasoned that society has a general interest in having businesses operate "in ways protective of the health of workers and their families, consumers, and environmental neighbors," *id.* at 1190 n.26. The court concluded that this interest, evidenced by the many federal health, safety and environmental laws, supports using workplace safety as a basis for the business necessity defense. *See id.*

195. In *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984), the Eleventh Circuit concluded that the business necessity defense should be allowed for fetal protection programs. *Id.* at 1552. The court "simply recognize[d] fetal protection as a legitimate area of employer concern to which the business necessity defense extends" as a matter of "public policy." *Id.* at 1552-53 nn.14-15. The court explicitly extended the defense beyond job relatedness, acknowledging that "fetal protection does not in a strict sense have anything to do with job performance." *Id.* at 1552.

196. In *Zuniga v. Kleberg County Hosp.*, Kingsville, Tex., 692 F.2d 986 (5th Cir. 1982), the hospital asked the Fifth Circuit to find that business necessity permitted the hospital to terminate a pregnant x-ray technician's employment to protect her unborn child from exposure to radiation. The Fifth Circuit resolved the case without analyzing the applicability of the defense to fetal protection programs. The court avoided the issue by finding that the program was a pretext for discrimination. *See id.* at 992. *See infra* notes 212-20 and accompanying text. Nevertheless, the court suggested in a footnote that the defense could be available. *See id.* n.10. Unlike the Fourth and Eleventh Circuits, the Fifth Circuit indicated that it might recognize potential economic liability as a legitimate basis for the defense. "[T]he economic consequences of a tort suit brought against the Hospital by a congenitally malformed child could be financially devastating, seriously disrupting the 'safe and efficient operation of the business.'" *Id.* (quoting *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971)). For a general discussion of the issue of Title VII and the problems of fetal protection, see Williams, *supra* note 118.

gitimacy of a defense based solely on potential litigation and economic loss.¹⁹⁷

As these courts have suggested, the business necessity defense provides the best mechanism for accommodating important public policies such as fetal protection because it can be broadened beyond strict job relatedness without unduly burdening equal employment rights.¹⁹⁸ Facially neutral rules harm equal employment opportunity less than intentionally discriminatory employment practices. A facially neutral rule, by definition, must be directed at serving a business need rather than at explicitly limiting the employment opportunities of one sex.¹⁹⁹ Further, a facially neutral rule cannot be justified by business necessity unless it represents the least discriminatory way an employer can accomplish a business purpose.²⁰⁰ By recognizing an important public policy goal as a legitimate basis for a business necessity defense rather than a bfoq defense, these courts ensure that the necessary goal can be met with the least adverse effect on equal employment.

The fetal protection cases provide a framework for applying the business necessity defense to privacy cases. First, they indicate that courts may apply the defense to privacy cases even though protecting third

197. The Fourth Circuit suggested that the employer's interest in avoiding "potential liability and consequent economic loss" might not in itself be a legitimate basis for the defense. *Wright v. Olin Corp.*, 697 F.2d 1172, 1190 n.26 (4th Cir. 1982). The Eleventh Circuit agreed that potential liability is too broad a factor to provide a basis for a business necessity defense. The court pointed out:

In today's litigious society, the potential for litigation rests in almost every human activity. For example, every employer faces the risk that a pregnant employee will encounter a workplace activity that would not normally be hazardous to a nonpregnant employee, but which could prove injurious to a developing fetus. These hazards range from slippery floors to uncontrolled cigarette smoke, asbestos, known and unknown carcinogenic materials used in the workplace and a plethora of other hazards of modern society.

Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1553 n.15 (11th Cir. 1984).

198. The approach taken in the fetal protection cases finds further support in another line of analogous cases. Massage parlors in a number of jurisdictions have challenged municipal ordinances forbidding opposite sex massages on the ground that these regulations are invalid under the supremacy clause because they force employers to violate Title VII. In *Wigginess Inc. v. Fruchtman*, 482 F. Supp. 681 (S.D.N.Y. 1979), *aff'd mem.*, 628 F.2d 1346 (2d Cir.), *cert. denied*, 449 U.S. 842 (1980), the Southern District of New York held that although the facially neutral regulation adversely affected female employment "this surely does not preclude the [city from] . . . prohibit[ing] practices it finds harmful to the public's health, safety, welfare or morals." *Id.* at 691. *But see Aldred v. Duling*, 538 F.2d 637, 638 (4th Cir. 1976) (*per curiam*) (no adverse effect on female employment because all employees were terminated). In contrast with hospitals and prisons, the massage parlors asserted that the restriction on opposite sex massages infringed on its customers' constitutional privacy rights to be served by *opposite* sex masseuses rather than same sex masseurs.

199. *See Williams, supra* note 118, at 681-82 ("Traditional title VII analysis forces an employer seeking to protect fetal health to develop a neutral policy in order to avoid title VII liability. The employer's solution must be general rather than gender-specific. The focus is thereby shifted to the health of offspring as affected by the exposure of both men and women.").

200. *See infra* notes 208-16 and accompanying text.

party privacy interests is unrelated to job performance. Second, they suggest that privacy can be a legitimate basis for the defense if, as a matter of public policy, society wants businesses to respect privacy rights. The Fourth Circuit relied on federal statutes protecting health and safety for evidence of a general public policy favoring fetal protection programs.²⁰¹ Because privacy enjoys the protection of the common law of torts and the United States Constitution,²⁰² courts can recognize privacy, like fetal protection, as a "legitimate area of employer concern to which the business necessity defense extends."²⁰³ Alternatively, following the Fifth Circuit's suggestion, privacy could support a business necessity defense on the ground that employers should be permitted to take actions necessary to comply with conflicting legal obligations and to protect themselves from civil liability to third parties.²⁰⁴ Third, the rationale for relying on the business necessity defense rather than the bfoq defense to accommodate fetal protection is equally applicable in privacy cases. The bfoq defense justifies intentional discrimination against one sex. The business necessity defense justifies neutral rules directed at accomplishing a legitimate business goal by the least discriminatory means, thus ensuring that privacy interests are accommodated with the least adverse impact on equal employment.

Recognizing that privacy interests can support a business necessity defense is only a first step to establishing the defense in a particular privacy case. The Fourth and Eleventh Circuits both emphasized that if an employer wishes to rely on business necessity to justify the adverse impact of a fetal protection program on female employment, it must establish by "independent, objective evidence" the "significance of the risk, the extent of its confinement to the unborn children of women as opposed to men workers, the consequent necessity of protective measures confined to women workers and the effectiveness of the actual program for the intended purposes."²⁰⁵ This requirement is an important safeguard to prevent the

201. See *supra* note 194.

202. See *supra* Part I.

203. *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1552 n.14 (11th Cir. 1984).

204. See *Zuniga v. Kleberg County Hosp.*, Kingsville, Tex., 692 F.2d 986, 992 n.10 (5th Cir. 1982). Neither *Olin* nor *Hayes* adopted this approach. See *supra* note 197 and accompanying text. Other courts have also rejected cost as a basis for business necessity. See, e.g., *Johnson v. Pike Corp. of Am.*, 332 F. Supp. 490, 495 (C.D. Cal. 1971) (business necessity "leaves no room for arguments regarding inconvenience, annoyance or even expense to the employer"). The Supreme Court has rejected cost as a defense to intentional discrimination, see *supra* note 122 and accompanying text, in language broad enough to suggest that cost is irrelevant in all discrimination cases. See C. Sullivan, M. Zimmer & R. Richards, *supra* note 189, at 56. If potential liability can excuse discrimination at all, it should be applied only to excuse neutral rules that have a negative impact. See *supra* notes 199-200 and accompanying text. Whether potential liability can ever justify disparate impact discrimination is beyond the scope of this Article. But even if it can, in order to comply with the business necessity defense employers still must seek the least discriminatory means of complying with conflicting statutory obligations. See *infra* notes 208-16 and accompanying text.

205. *Wright v. Olin Corp.*, 697 F.2d 1172, 1190 (4th Cir. 1982); see *Hayes v. Shelby*

business necessity defense from swallowing equal employment. If courts rely on employers' bald assertions of necessity, many discriminatory but facially neutral programs will survive judicial scrutiny even though they are not really necessary.²⁰⁶

In privacy cases, the employer's proof must be legal rather than scientific. Courts should decline employers' invitations to find that business necessity justifies privacy restrictions unless the court finds that the disputed policies effectively protect legitimate constitutional, statutory or common law privacy rights that outweigh equal employment goals.²⁰⁷

Concluding that third party privacy interests, if legitimate, form the basis of a business necessity defense does not end the analysis. Even a neutral rule that effectively promotes a compelling business interest can violate Title VII. In *Albemarle Paper Co. v. Moody*,²⁰⁸ the Supreme Court created a three part test for analyzing disparate impact cases—after the plaintiff has established a prima facie case of disparate impact discrimination and the employer has established that this discriminatory neutral policy is justified by business necessity, “it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest Such a showing would be evidence that the employer was using its tests merely as a ‘pretext’ for discrimination.”²⁰⁹

Since *Albemarle*, the Court has mentioned the third step of the disparate impact analysis several times.²¹⁰ Nonetheless, because the Court has

Memorial Hosp., 726 F.2d 1543, 1553 (11th Cir. 1984) (business necessity defense available because employer “*already* proved . . . that its policy is justified on a scientific basis and addresses a harm that does not affect men”) (emphasis in original). The court in *Olin* indicated that this burden of proof, imposed on the employer is a necessary prerequisite to establishing that “a specific safety-related ‘necessity’ is sufficiently ‘compelling’ to ‘override’ conflicting private interests protected by Title VII.” *Olin*, 697 F.2d at 1190 n.26 (quoting *Robinson v. Lorillard*, 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971)); see also *Williams*, *supra* note 118, at 695 (“The characterization of an employer's purpose as compelling, however, does not resolve the case in its favor. . . . Even if the purpose is compelling, does the policy ‘effectively carry out the business purpose it is alleged to serve?’”) (quoting *Robinson*, 444 F.2d at 798). This requirement that the employer establish that his program or rule is necessary and effective is analogous to requirements that the Supreme Court has imposed in job related business necessity cases. Facially neutral selection criteria that adversely affect minority employment opportunities must effectively test some ability or skill that is necessary for successful job performance. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

206. See *Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496, 499-500 (7th Cir. 1977), cert. denied, 435 U.S. 934 (1978) (accepting without proof, due to supposed impossibility of statistical demonstration, employer's assertion that rule against hiring employee spouses is a business necessity justifying adverse impact on female employment).

207. See *supra* Part I.

208. 422 U.S. 405 (1975).

209. *Id.* at 425 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 804-05 (1973)).

210. See, e.g., *Connecticut v. Teal*, 457 U.S. 440, 447 (1982) (if employer establishes job relatedness, “the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination”); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979) (rebuttal claim of pretext precluded by lower court finding that

never applied the "pretext" or "less discriminatory alternatives" rebuttal, its scope, application and purpose remain unclear. Some commentators and courts have suggested evidence of less discriminatory alternatives defeats the business necessity defense only if such evidence demonstrates that the employer's facially neutral rule constitutes a pretext for intentional discrimination.²¹¹ Others indicate that even if the plaintiff cannot establish pretext, the availability of less discriminatory alternatives rebuts the defendant's proof of "necessity."²¹² Finally, although most courts and commentators assume that *Albemarle* requires the plaintiff to bear the burden of establishing less discriminatory alternatives or pretext,²¹³ others, including the EEOC,²¹⁴ "would require the defendant to shoulder the burden as part of its showing of the necessity of the selection criteria."²¹⁵ The fetal protection cases reflect this uncertainty in the law.²¹⁶

challenged rule not discriminatorily motivated); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (plaintiff bears burden of showing less discriminatory alternatives).

211. See Note, *Rebutting the Prima Facie Case Under Title VII: Limiting Judicial Review of Less Restrictive Alternatives*, 1981 U. Ill. L. Rev. 181, 207-10 (1981); see also *Harless v. Duck*, 14 Fair Empl. Prac. Cas. (BNA) 1616, 1625 (N.D. Ohio 1977) (court willing to consider whether evidence of less discriminatory alternatives establishes a pretext for intentional discrimination).

212. See, e.g., *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1553 (11th Cir. 1984); *Wright v. Olin Corp.*, 697 F.2d 1172, 1191 n.29 (4th Cir. 1982). One commentator has criticized the Supreme Court's reference to pretext in disparate impact cases because "pretext is, by definition, a demonstration of discriminatory intent. . . [and] [i]ntent to discriminate and racial (or sexual) animus are . . . irrelevant" in disparate impact cases. *Williams*, *supra* note 118, at 694.

213. See, e.g., *Wright v. Olin Corp.*, 697 F.2d 1172, 1191 n.29 (4th Cir. 1982); B. Schlei & P. Grossman, *supra* note 191, at 1330 n.152 (cases cited in footnote).

214. See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.3B (1985).

215. B. Schlei & P. Grossman, *supra* note 191, at 1331; see *id.* n.154 (cases cited in footnote); *Williams*, *supra* note 118, at 693-95.

216. All three courts in the fetal protection cases placed the burden on the plaintiff to prove "acceptable alternatives." *Wright v. Olin Corp.*, 697 F.2d 1172, 1191 n.29 (4th Cir. 1982); see *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1553 (11th Cir. 1984); *Zuniga v. Kleberg County Hosp.*, Kingsville, Tex., 692 F.2d 986, 992 n.9 (5th Cir. 1982). The Fourth Circuit, however, "reject[ed] the possible implication from the Supreme Court's decisions in *Albemarle Paper* and *Beazer* that the only possible effect of such rebutting evidence is to show discriminatory intent by proof of 'pretext.' " *Olin*, 697 F.2d at 1191 n.30. The court held that evidence of less discriminatory alternatives can establish pretext, or it can defeat a prima facie case of business necessity by establishing that a program is partially or wholly unnecessary. See *id.* at 1191-92. The Fifth Circuit applied a pretext analysis without discussing the relevance of less discriminatory alternatives to necessity. See *Zuniga*, 692 F.2d at 992. The Eleventh Circuit applied a less discriminatory alternatives rebuttal without discussing whether the evidence was relevant to pretext or to necessity. See *Hayes*, 726 F.2d at 1553.

In my view, the Fourth Circuit's interpretation of the plaintiff's rebuttal case is both logical and consistent with Supreme Court precedent. Although discriminatory intent is irrelevant to establishing a prima facie case of impact discrimination, a facially neutral employment policy that ostensibly serves a compelling business purpose could mask discriminatory intent. If it does and if the plaintiff can show that it does by proving that it is underinclusive or that there are less discriminatory alternatives available, he should be permitted to do so. Because such proof establishes a new prima facie case of intentional discrimination, rather than disparate impact discrimination, the plaintiff should bear the

Regardless who bears the burden of proof, however, evidence of less discriminatory alternatives, overbreadth and underinclusiveness is relevant to show that a neutral rule is either unnecessary or a pretext for discrimination. A neutral rule that has an adverse impact on the employment of one sex cannot survive if the plaintiff can present such evidence.

How does the three part impact analysis apply in privacy cases? Applying this analysis in place of the bfoq/privacy defense will not significantly affect the results in prison cases. Under the bfoq/privacy analysis, rules prohibiting opposite sex guards are permissible unless the prison can make structural or procedural changes that avoid or eliminate privacy infringements.²¹⁷ Because most privacy infringements in the prison setting can be avoided or eliminated, exclusionary policies in prisons have not survived attack under this bfoq analysis. If courts reject the bfoq defense, the results will be similar. In jurisdictions where male guards traditionally have guarded both male and female inmates, rejecting the bfoq defense in privacy cases will encourage prison administrators to re-examine the necessity of excluding female guards from male inmate residential areas and to promulgate neutral rules to protect legitimate inmate privacy interests.

A neutral rule prohibiting opposite sex guards in both male and female prisons will reduce female employment opportunities because most prison systems have predominantly male inmate populations.²¹⁸ Prisons adopting or using such rules will be required, therefore, to establish a business necessity for the rule. Although a business necessity defense can be based on privacy interests, privacy concerns would not justify such a rule because there are less discriminatory alternatives available to protect these interests, alternatives such as installing glass doors on shower stalls, permitting inmates to use privacy curtains or providing inmates with a five-minute warning before morning count.

Rejecting the bfoq defense in favor of the three part impact analysis

burden of proof. The plaintiff's rebuttal evidence, however, should not be restricted to establishing discriminatory intent because an employment policy cannot be "necessary" if it is overbroad or if the employer's stated purpose can be accomplished equally well with less discriminatory effects. My one point of disagreement with the Fourth Circuit approach is that the plaintiff should have an opportunity to rebut the defendant's necessity proof, but should not be required to bear the ultimate burden on that issue.

The Supreme Court has never discussed the relevance of overbreadth or less discriminatory alternatives to the employer's proof of necessity. The Court also has never declared such evidence irrelevant. The Court came close, however, in *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (dictum), where it stated that "[t]he District Court's express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination." *Id.* at 587. This statement should not be read to render "less restrictive alternatives" evidence irrelevant because it is dictum in a case that turned on the plaintiffs' failure to present an adequate prima facie case. *See id.*

217. *See supra* notes 109-13 and accompanying text.

218. *See supra* note 19 and accompanying text.

would, however, significantly affect the results in privacy cases involving health care professionals. If, as in *Backus*, a male nurse wished to work in the obstetrics ward of a hospital, the hospital could not respond, as it could under the bfoq analysis, by excluding males from obstetrics ward nursing positions.²¹⁹ The hospital would be forced to reevaluate the privacy concerns of its patients and might conclude that intimate contact is already so prevalent between health care professionals and patients of the opposite sex that obstetrics nursing should be equally open to male and female nurses. Such a rule fully complies with Title VII because it is neutral and has no adverse impact on either male or female employment. If the hospital concludes, however, that its obstetrics patients should be protected from unrestricted intimate contact by male nurses, there are several sex-neutral approaches it could take to provide that protection.

First, it could modify its procedures to ensure that patients are protected from any avoidable privacy infringement, such as being viewed while using the toilet or shower. Although this approach would enhance both privacy and equal employment, it would not eliminate the privacy problem because in a hospital setting, many invasions of privacy are unavoidable.

Second, the hospital could prohibit all nurses from touching or viewing patients of the opposite sex. Such a prohibition, although sex-neutral, might adversely affect equal employment. If the hospital implements the rule by replacing female nurses with male nurses in order to have enough male nurses to treat male patients, the rule adversely affects female employment. Even if the employer establishes that protecting patient interests is a business necessity, such a rule violates Title VII if the plaintiff can demonstrate the availability of a less discriminatory alternative. One such alternative might be to require nurses treating patients of the opposite sex to delegate intimate care duties to other health care professionals²²⁰ who are the same sex as the patient. This approach currently is used by some hospitals and law enforcement authorities for extremely intrusive procedures such as inserting catheters²²¹ or conducting strip searches.²²² It could easily be expanded to cover other unavoidable contacts. Although delegating intimate contact duties might not be practical in an emergency, opposite sex contacts could be permitted on an emergency basis because the patient's consent to opposite sex emergency treatment can be presumed. Another drawback to delegating intimate care duties is cost—the hospital might need to hire additional male nurses or aides to handle the intimate care of male patients. As job segregation diminishes, however, the costs of same sex treatment will di-

219. See *supra* notes 130-34 and accompanying text.

220. For example, another nurse, an orderly, an intern or a physician's assistant.

221. Mitchell Interview, *supra* note 137 (stating that this procedure is currently in use at Baptist Medical Center).

222. See, e.g., *United States v. Montoya de Hernandez*, 105 S. Ct. 3304, 3307 (1985) (male customs inspector had female customs officer strip search female suspect).

minish because health professionals of both sexes will be readily available.

Third, the hospital could permit nurses to treat patients of the opposite sex, but require that whenever they touch or view such patients, they must be accompanied by a chaperone who is the same sex as the patient. This approach probably would not adversely affect the employment of either sex. Again, requiring same sex chaperones may be inefficient at first, but as segregated health care professions become integrated, same sex chaperones will become more readily available.

Fourth, the hospital could permit nurses to treat patients of the opposite sex as long as the patients do not object. Such an approach would be permissible unless patient complaints adversely affect the employment of one sex, in which case this facially neutral rule would violate Title VII because patient privacy can be protected by less discriminatory rules such as requiring chaperones or delegating contact duties.

In the short run, each of these approaches would facilitate the integration of the health professions. In the long run, the presence of male and female health care providers filling nontraditional health care roles may change patient privacy attitudes and eliminate or reduce the need for privacy restrictions on opposite sex providers.

The stark contrast between the total exclusion permitted by the bfoq analysis and the goal oriented least discriminatory alternatives required under the business necessity defense again demonstrates the advantages of accommodating important policy concerns that are unrelated to job performance under the business necessity defense rather than the bfoq defense. Rejecting the bfoq defense forces courts and employers to reconsider the legitimacy of asserted privacy interests. Facially neutral rules are less harmful to equal employment than intentionally discriminatory employment practices because they are goal directed rather than expressly exclusionary and because they cannot be justified by business necessity unless they represent the least discriminatory means of accomplishing the employer's legitimate business purpose.

Thus, by rejecting the bfoq/privacy defense courts would compel hospitals to reconsider the legitimacy of privacy concerns and to protect legitimate concerns with facially neutral rules having the least discriminatory effect possible. When applied to privacy cases in health care, the results of such an approach differ significantly from the results achieved under the bfoq defense analysis. Without sacrificing legitimate patient privacy interests, previously sex-segregated health professions would be opened up to both males and females. Unavoidable legitimate privacy concerns would no longer justify policies excluding one sex but not the other from positions requiring intimate contact with patients of the opposite sex. In fact, privacy would not justify even neutral exclusionary policies that adversely affect equal employment because hospitals must take the less discriminatory approach of restricting specific job duties rather than entire job categories.

CONCLUSION

How should courts resolve the conflict between privacy interests and equal employment? Common sense dictates that we should prefer a solution that enhances both privacy and equal employment. Common sense finds support in the law of statutory construction. When a statute and constitutional or common law rights appear to conflict with each other, courts seek to give effect to both legal obligations by interpreting them to harmonize. Logically, then, the first step toward resolving the conflict between equal employment and privacy is to interpret Title VII to require employers to eliminate all privacy invasions that are not absolutely necessary, thereby removing the conflict, protecting third party privacy interests and permitting equal employment. For the remaining unavoidable intrusions, courts should interpret Title VII to permit employers to protect privacy interests, but require that they devise ways of protecting those interests that minimize any negative impact on equal employment.

Does Title VII permit such a solution? Yes! Under traditional Title VII analysis, the privacy interests of third parties cannot be a basis for a bfoq defense because males and females are equally capable of caring for patients, searching and supervising prisoners, fitting clothes and cleaning bathrooms and locker rooms. Courts faced with conflicting privacy interests have succumbed to the temptation to broaden the bfoq defense to accommodate privacy interests. This approach creates inequities and maintains the status quo. Privacy interests can be accommodated without expanding the bfoq defense. Courts should apply a narrow bfoq defense and prohibit employers from intentionally discriminating against one sex to protect third party privacy interests. Title VII permits employers to impose legitimate nondiscriminatory policies that are not a pretext for discrimination, policies such as those I have suggested. Strict application of the bfoq defense would encourage employers to adopt neutral policies to protect patient, customer or prisoner privacy interests. Of course, some facially neutral policies will reduce the employment opportunities of one sex or the other. That adverse impact can be justified by business necessity. The business necessity defense is the best place to accommodate important policy concerns such as privacy. The defense is only available to justify neutral rules that are necessary and effective to protect legitimate privacy interests and that are the least discriminatory means of protecting those interests. Thus, Title VII leaves room for carefully crafted neutral employment policies designed to protect legitimate privacy interests while restricting equal employment to the least extent possible.

